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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9125.

ARKANSAS POWER & LIGHT COMPANY, *Appellant*,

v.

FEDERAL POWER COMMISSION, ET AL., *Appellees*.

Appeal from the District Court of the United States for the District of Columbia.

JOINT APPENDIX.

Complaint for a Declaratory Judgment and Injunction

2 Filed Jan 24 1945

In the United States District Court
For the District of Columbia

ARKANSAS POWER & LIGHT COMPANY, *Plaintiff*,

v.

THE FEDERAL POWER COMMISSION AND BASIL MANLY, LELAND OLDS, CLAUDE L. DRAPER, NELSON LEE SMITH AND JOHN W. SCOTT, AS COMMISSIONERS OF THE FEDERAL POWER COMMISSION; THE DEPARTMENT OF PUBLIC UTILITIES OF THE STATE OF ARKANSAS, MARVIN HATHCOAT, A. B. HILL AND CHARLES C. WINE, AS COMMISSIONERS OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE STATE OF ARKANSAS, *Defendants*.

A.

1. Plaintiff, Arkansas Power & Light Company, is a corporation organized and existing under the laws of the State of Arkansas. Its principal office and place of business and post office address are Simmons National Building, Pine Bluff, Arkansas.

2. (a) The defendant, the Federal Power Commission (sometimes hereinafter referred to as "Commission"), is an administrative agency of the United States of America, created and empowered by the Federal Power Act (16 U. S. C. A. Sec. 791a et seq.). Its address is Washington 2, D. C. The defendants Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith, and John W. Scott are the duly appointed, qualified and acting commissioners and members of the Federal Power Commission. Their address is c/o the Federal Power Commission, Washington 2, D. C. The individual defendants named in this paragraph as

members and commissioners of the Federal Power Commission and the Commission are charged with the duties of administering said Federal Power Act.

2. (b) The defendant, the Department of Public Utilities of the State of Arkansas (sometimes hereinafter referred to as the "Department"), is an administrative agency of the State of Arkansas, created and empowered by Act 324 of the Acts of the General Assembly of Arkansas approved April 2, 1935. The Department's address is Capitol Building, Little Rock, Arkansas. The defendants Marvin Hathcoat, A. B. Hill and Charles C. Wine are the duly appointed, qualified and acting commissioners of the Department and their address is the same as that of the Department. The individual defendants named in this paragraph as commissioners of said Department and the said Department are charged with the duties of administering said Act 324.

B.

3. This action arises under the Constitution and laws of the United States and of the State of Arkansas and
3 orders of the Commission and of the Department.

By this suit the plaintiff seeks, with other relief, a declaratory judgment under Section 274d of the Judicial Code (28 U. S. C. A. Sec. 400) for the purpose of settling and determining a patent and irreconcilable conflict between the asserted jurisdiction and powers of the Commission and the asserted jurisdiction and powers of the Department and, in this connection, hereinafter prays judgment:

(1) That the Commission is asserting, assuming and attempting to exercise power, authority, and jurisdiction not conferred upon it by the Federal Power Act whereby, as hereinafter fully set forth, the Commission is undertaking to and will:

(a) Regulate, control, supervise and direct the keeping of, and the entries made and to be made, in plaintiff's primary, dominant and principal books of accounts;

(b) Require, direct and order all amounts or items appearing upon the said books of accounts of plaintiff representing excess over original cost of its property used in public service to be written or charged off or amortized out of said books; or

(2) In the event the court should determine that the Commission has colorable power, authority and jurisdiction under said Federal Power Act to do, perform, direct or order done, any of the acts or things set forth in paragraphs 3 (1) (a) or 3 (1) (b) hereof, that the sections and paragraphs of said Act, more particularly hereinafter set forth, claimed to confer, or colorably conferring, such power, authority and jurisdiction, each violates the Commerce Clause (Section 8, clause 3) of Article I, the full faith and credit clause (Section 1) of Article IV of the Constitution of the United States, and Amendment X and the due process clause of Amendment V to such Constitution;

(3) In the event it should be determined that the Commission has the power and authority to do and perform and to direct and order the plaintiff to do and perform the matters and things set forth in paragraphs 3 (1) (a) and 3 (1) (b) hereof, that said Act 324 and the order issued by the Department on June 24, 1944, both in the particulars hereinafter set forth, violate the Commerce Clause of Article I of the Constitution of the United States and are void and of no force and effect.

4. As is hereinafter more fully set forth, the value of the rights which plaintiff seeks to protect, the value of the property and property rights and the extent of the injury involved herein exceed the sum of three thousand dollars ($3,000), exclusive of interest and costs.

C.

5. Exclusively in the State of Arkansas, the plaintiff owns and operates (a) facilities for the generation and transmission of electric energy transmitted and sold in both interstate and intrastate commerce and (b) facilities used

exclusively in the transmission and distribution of electric energy in intrastate commerce. It also owns and operates a street railway and motor bus transportation system, natural gas distribution properties, and steam heat facilities. It formerly owned and operated ice manufacturing properties and facilities for the local distribution of water.

4 All of its business and operations are transacted and carried on in the State of Arkansas. The plaintiff's business is predominantly local and intrastate and the greater portion of its property is used exclusively in such business.

6. The plaintiff is a public utility within the terms and provisions of Section 1 of Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935. By the terms of said Act the Department of Public Utilities of the State of Arkansas was created and empowered, and all of the power of regulation and supervision reserved by the State of Arkansas, and not granted to the United States by the Commerce Clause of the Federal Constitution, over the property and facilities of the plaintiff, its business transactions, activities, accounting, records and books of accounts were, by the terms of said Act, delegated to and conferred upon said Department. The said Department has, since its creation and organization, actively and vigorously asserted and exercised the said powers with respect to the property, business transactions and affairs of the plaintiff.

7. The Department, among other authority and powers, is specifically authorized and empowered to promulgate, and require the plaintiff to keep and maintain primary, dominant and principal books of accounts according to, a uniform system of accounts of the Department and its rules regulating accounting. The Department is authorized to regulate, and actually regulates, the issuance of securities by plaintiff and the creation of liens upon its property devoted to the public service.

8. The Department has promulgated and adopted a uniform system of accounts, a copy of which is made a part hereof to the same extent as if copied herein in full, is marked Exhibit 1 and filed herewith.

9. By order dated June 24, 1944, the Department, acting within its lawful powers, and after an extended hearing, made, in conformity with its said uniform system of accounts, a complete reclassification of plaintiff's plant account, and separately found and fixed, as of December 31, 1936, and of December 31, 1943, the original cost of plaintiff's electric, gas, steam heat, ice, water, and transportation properties, the respective acquisition costs thereof and the excess of the recorded costs of said property over their actual cost to the plaintiff, or affiliated interests, as the results of arm's-length bargaining, and directed the plaintiff to record in its primary, dominant and principal books and records, in the proper and applicable accounts thereof, such amounts as would reflect the Department's findings, and further directed the disposition of the several amounts directed to be charged to the acquisition accounts, to-wit: Account 100.5 (Electric Plant Acquisition Adjustments) and to Account 107 (Electric Plant Adjustments). The entire and complete action of the said Department will more fully appear from a copy of its findings and order dated June 24, 1944, which is made a part hereof to the same extent as if copied herein in full, is marked Exhibit 2 and filed herewith.

10. The Department also by its order (Ex. 2 hereto) ascertained and fixed a rate base on which plaintiff shall be permitted to earn a reasonable return from its electric operations. This rate base was found to be the prudent investment made by the plaintiff in electric facilities, determined by the Department after giving recognition to the several adjustments heretofore referred to. The Department also directed the plaintiff to file new schedules of rates for all its several classes of customers which would effect an annual reduction in its gross electric revenue for

the year 1943 of at least $975,000.00. The Department further promulgated and adopted a formula for the future automatic adjustment of plaintiff's electric rates.

11. The plaintiff, as permitted by the Arkansas statute, secured a judicial review of the Department's order (Ex. 2 hereto) by a court of that state having jurisdiction. The court affirmed the said order, which has become final. A copy of the judgment of said court is made a part hereof, marked Exhibit 3, and filed herewith.

12. The plaintiff has readjusted its capital structure to comply with, and in all other respects has complied with, the terms and directions of said order (Ex. 2 hereto) of the Department and has filed new schedules of rates effecting an estimated reduction in its electric revenue of more than $1,100,000.00 annually.

13. All of the entries necessary to reflect the adjustments directed and ordered to be made by the Department were made upon the primary, dominant, principal, and only, books of accounts kept and maintained by the plaintiff.

14. The plaintiff is also a public utility within the meaning of Section 201 (e) of the Federal Power Act. The purpose of that Act was primarily to regulate rates and charges for interstate energy. By that Act (Sec. 201 (b)) Congress conferred upon the Commission jurisdiction over a very small portion of plaintiff's electric facilities—only over those which transmit energy actually moving in interstate commerce and used in the sale thereof at wholesale for resale—and specifically withheld from the Commission power or jurisdiction over all of plaintiff's property used exclusively in the intrastate transmission and distribution of electric energy and the sale thereof to consumers in the State of Arkansas, and over property other than electric.

15. Under said Federal Power Act, the Commission has no jurisdiction or power to require the plaintiff to charge off or amortize out of its primary, dominant and principal books of account any items ascertained to represent excess of recorded over original cost. Nor does the Commission

have any power over, or jurisdiction to regulate, the issuance of securities by the plaintiff.

16. Notwithstanding the limitations upon the jurisdiction of the Federal Power Commission over plaintiff's property, that Commission, acting under authority supposed or assumed to have been conferred upon it by Secs. 4 (b), 301 (a), 304 (a), and 309, and par. (13) of Sec. 3 of said Federal Power Act, on June 16, 1936, issued its order numbered 42 and thereby adopted an accompanying system of accounts entitled "Uniform System of Accounts prescribed for public utilities and licensees subject to the provisions of the Federal Power Act." Copies of said orders, statements of amendments thereto, and said uniform system of accounts, as amended and as distributed by the Commission, are made a part hereof, marked Exhibit 4 hereto, and filed herewith.

17. By reason of the instructions made a part of its said uniform system of accounts and included in Exhibit 4 hereto, the Commission has, unlawfully and without authority, assumed and, as will hereinafter appear, now asserts power and authority not granted or authorized, directly or by implication, by the sections of the Federal Power Act set out in the foregoing paragraph, to regulate, dictate, and supervise the entries made and to be made in plaintiff's primary, dominant and principal books of accounts.

18. If the language of the sections, or either of them, of the Federal Power Act set out in paragraph 16 hereof is sufficient of itself to authorize the Commission to assume and exercise regulatory and supervisory power and authority over all or any of the entries made and to be made in plaintiff's primary, dominant and principal books of account, with respect to all or any of its property or
6 facilities, and all or any transactions of the plaintiff, said sections transcend and violate the Commerce Clause of Article I of the Constitution of the United States and Amendment X thereto, and are therefore void and of no force and effect.

19. A large part of the property and facilities of the plaintiff are exclusively used in the intrastate transmission and distribution of electric energy. Said property so used, as well as many transactions of the plaintiff, have no relation or bearing, directly or otherwise, upon property or facilities used in interstate commerce or transactions pertaining to said commerce.

20. If the language of the sections, or either of them of the Federal Power Act set out in paragraph 16 hereof authorizes or empowers the Commission to regulate, supervise or direct the entries made and to be made in plaintiff's primary, dominant and principal books of accounts with respect to its property and facilities used exclusively in the intrastate transmission and distribution of electric energy, or with respect to transactions on property having no relation or bearing, directly or otherwise, upon property or facilities used in interstate commerce, said sections, or either of them, thought so to authorize and empower the Commission, violate the Commerce Clause of Article I of the Constitution of the United States and Amendment X thereto.

21. (a) The Commission, proceeding under "Instructions—Electric Plant Accounts" set out in its uniform system of accounts and Sec. 208 (b) of the Federal Power Act, required the plaintiff to file a report, which has been filed, reclassifying its electric and other plant accounts pursuant to the Commission's uniform system of accounts, as well as a statement of the original cost of all its property used in supplying electric service.

(b) At the direction of the Commission, members of its staff made an examination and audit of said report and statement and filed an original report and recommendations with respect thereto. After the Department had issued its order (Ex. 2 hereto) said staff made a further examination and audit with respect to said reclassification report and statement of original cost as filed by the plaintiff, and filed a supplemental report and recommendations.

Copies of said original and supplemental reports and recommendations are made a part hereof and respectively marked Exhibits 5 and 6 hereto and are filed herewith.

(c) Said supplemental staff report, as of January 1, 1937, makes a reclassification of plaintiff's plant account covering all of its property in electric and other public service and recommends that the original cost of plaintiff's electric property be established at $35,082,500.38 and that the amount of $11,881,199.23 be established in Account 107 (Electric Plant Adjustments). The said supplemental report also sets up a new Account 108.15, not specifically authorized by the Commission's uniform system, and recommends that the amount of $9,293,057.46 be established therein. The amount recommended by said staff report to be established in Account 108.15 represents the difference between the staff's recommendations as to original cost of all of plaintiff's property and the staff's determination of actual cost thereof to plaintiff or its affiliates as the result of arm's-length bargaining.

(d) Said supplemental staff report, among other things, recommends that $9,141,473.01 of the amount by said report established in Account 107 be charged to Earned Surplus or Capital Surplus, and that the remainder of said amount be charged to other accounts. Said supplemental staff report also recommends that the plaintiff be required to submit a plan for the disposition of the $9,293,057.46 established in Account 108.15.

7 (e) All of the debits and credits and adjustments made since December 1, 1937 by the plaintiff to its plant account were by said staff report reversed upon the theory that they were prematurely made without the approval and order of the Commission, although they were approved or directed to be made by the Department.

22. On September 27, 1944, the Commission, in a cause carried upon its docket entitled "In the matter of the Arkansas Power & Light Company, Docket No. IT-5829" issued an order requiring plaintiff to respond to the recom-

mendations of said supplemental staff report, such response to include a plan for the disposition of the amounts by said supplemental staff report established in the adjustment accounts, and to report any amounts disposed of by the plaintiff since December 31, 1936 which the said staff report may have established in Accounts 107 and 108.15, together with the manner in which they were disposed of. A copy of said order is made a part hereof, marked Exhibit 7 hereto, and filed herewith.

23. In issuing said order (Ex. 7 hereto) and therein directing that a hearing be held and in requiring the plaintiff to respond to the recommendations of said supplemental staff report, and in incorporating in said order the other matters therein mentioned, the Commission is unlawfully exercising power and authority, not conferred upon it by the Congress, whereby the Commission will (1) ascertain and fix, and direct the recordation upon plaintiff's primary, dominant and principal books of accounts, of the original cost of plaintiff's property and facilities used in interstate commerce, electric transmission and distribution facilities used exclusively in intrastate commerce and gas, steam heat, water, ice, and transportation facilities; (2) direct that plaintiff in said books of accounts charge to earned or capital surplus $9,141,473.01, and require the plaintiff to amortize over a period of years by charges to its net annual earnings $9,293,057.46 established by said supplemental staff report, respectively, in Accounts 107 and 108.15.

24. If any section or paragraph of the Federal Power Act should be construed to confer or to grant power and authority to the Commission to do, or to require and order the plaintiff to do, any of the matters and things set out in paragraph 23 hereof, each and every of said sections and paragraphs would violate the Commerce Clause of Article I of the Constitution of the United States and Amendment X thereto, and each and every such section and paragraph of said Act by reason of such construction would be rendered void and of no force and effect.

25. The establishment of the original cost of plaintiff's electric property and the disposition of the amounts established by the supplemental staff report (Ex. 6 hereto) in Accounts 107 and 108.15, both as undertaken by the Commission by its order (Ex. 7 hereto) and by its order of January 2, 1945, hereinafter referred to (Ex. 9 hereto), will not aid or facilitate the discharge of any of the Commission's duties or powers conferred upon or granted it by the Federal Power Act, nor will any disposition of said amounts have any relation or bearing, directly or otherwise, upon the transmission and sale of electric energy at wholesale in interstate commerce, or the rates therefor.

26. Therefore, the Commission does not have, and the Congress is powerless under the Commerce Clause of Article I of the Federal Constitution to grant it, any power and authority to consider and determine the issues stated in or raised by the said orders (Exs. 7 and 9 hereto) insofar as such issues and the determination thereof may control or affect any entries made or to be made in plaintiff's primary, dominant and principal books of accounts.

8 27. The uniform system of accounts established by the Department and now followed and observed by the plaintiff is substantially, if not exactly, the same as the system of accounts adopted and enforced by the Commission with respect to the text of accounts, the numbers thereof, and instructions and directions as to the particular character of items to be debited and credited to said particular accounts.

28. Inasmuch as the original cost of plaintiff's electric plant, as established by the Department's order (Ex. 2 hereto), is only $254,160.33 more than such cost, as "established" by the staff of the Commission, which difference could have no appreciable effect upon rates for energy transmitted and sold in interstate commerce, the primary, dominant and principal books of accounts of the plaintiff, as required to be kept under the jurisdiction of the Department and as adjusted by the Department's order (Ex. 2

hereto), fully reflect and furnish all information essential, necessary, or convenient to the exercise of the powers and authority conferred upon the Commission.

29. (a) At least $6,947,058.92 established and retained in Account 100.5 by the Department's order (Ex. 2 hereto) is included in the amounts "established" by the staff of the Commission in Accounts 107 and 108.15. The Department in said order determined that the amount next aforesaid represented actual arm's-length cost and "value as of the date it was expended and that such value existed and was inherent in" plaintiff's "electric system on December 31, 1943, and, therefore the amount of said item should not be charged off or amortized, and should be recognized and included as a part of the valid and present existing assets and values."

(b) The balance remaining in Accounts 107 and 108.15, as "determined" by the Commission's staff, with the exception of $254,160.33, the amount by which Department's original cost of plaintiff's electric property exceeds the staff's finding as the original cost of said property, has been disposed of by the plaintiff either prior to the order of the Department, or subsequent thereto, by charges to other accounts, including charges to earned or capital surplus and charges to Account 108. The dispositions of all these amounts were either approved by, or made at the direction of, the Department.

30. In requiring the plaintiff to "set forth any amounts disposed of by it since December 31, 1936, which are recommended for classification by the staff in Accounts 107 and 108.15 together with the manner in which such disposition was made" (Ex. 7 hereto), the Commission proposes to and will exercise power to review, reverse, and set aside the findings and order of the Department (Ex. 2 hereto).

31. The Commission has no power or authority to undertake to or to do the matters and things as set forth in paragraph 30 hereof. If, however, the Federal Power Act is construed to grant such power, the section or paragraph

thereof thought, or construed, to make such a grant of power would deny to the public acts and judicial proceedings of the State of Arkansas the full faith and credit secured to said State by Section 1 of Article IV of the Constitution of the United States, and said sections or paragraphs would also violate the Commerce Clause of Article I of, and Amendment X to, said Constitution, and in either event said sections and paragraphs would be void and of no force and effect.

32. (a) Under Section 61 of the Arkansas Utility Act (Act 324 of 1935) the plaintiff is subjected to a fine of not less than $100.00 nor more than $1,000.00 for each day's failure to obey and comply with each and every direction and order of the Department.

9 (b) Section 315 (a) and Section 316 of the Federal Power Act subjects the plaintiff and its officers, agents and employees to severe and onerous criminal penalties for failure to comply with any order, rule, regulation, restriction or condition of the Commission.

33. (a) The orders issued by the Commission (Exs. 7 and 9 hereto), among other things, require the plaintiff to submit a plan for eliminating from its books of accounts the amounts assigned by the supplemental staff report (Ex. 6 hereto) to Accounts 107 and 108.15. In submitting a plan for the disposition of said amounts different from the disposition already made thereof, with the approval and at the direction of the Department, the plaintiff would be proposing to violate the Arkansas statute and if such plan were carried into effect the plaintiff would incur the penalties provided in said statute. Especially would this be true, since many of the items established in said accounts by said supplemental staff report have no relation whatever to the acquisition of facilities used in, or transactions pertaining to, interstate commerce or to plaintiff's electric plant and, further, since all of said items have been definitely considered, determined, classified and disposed of by the Department and plaintiff's primary, dominant and prin-

cipal books of accounts have been adjusted to reflect the Department's findings and order upon which the Department has fixed plaintiff's electric rate base.

(b) On the other hand, should the plaintiff not comply with the directions and orders of the Commission, and such orders as may hereafter be made by it, the plaintiff will incur the penalties of the Federal Power Act. Because of the circumstances heretofore set forth, the plaintiff's position is at once uncertain and perilous.

34. The Department has threatened to and will prosecute the plaintiff, under the laws of the State of Arkansas, (1) for any failure to observe and comply with the orders and directions of the Department with respect to the disposition of any items found by the Department to represent excess over original cost of plaintiff's electric and other property, and (2) if the plaintiff at the instance of the Commission, should make any change, adjustment, or alteration in any account as ascertained, determined or directed to be stated by the Department in its said order (Ex. 2 hereto).

35. The threatened action of the Department and that proposed by the Commission raise a sharp conflict of jurisdiction between the agencies of the State of Arkansas and the United States and the plaintiff is entitled to have this conflict clarified and determined before proceeding further in the cause now pending before the Commission.

36. (a) Inasmuch as the plaintiff is an Arkansas Corporation operating exclusively in that state and owning no utility property beyond the confines thereof (except for an unimportant distribution extension from Junction City, Arkansas, into Louisiana), it is required by the laws of said state to maintain and keep under the jurisdiction and supervision of the Department primary, dominant, and principal books of accounts in such form and manner as the Department may direct and as provided by said Department's uniform system of accounts. From the entries recorded and set forth in said primary, dominant and principal books of accounts the plaintiff must, from time to time, compile

and circulate, for the information of its bondholders, preferred and common stockholders, and the public, annual statements, and the said entries recorded in said books provide the basic data for the payment of bond interest and the declaration of dividends under the laws of the State of Arkansas.

(b) For the purposes aforesaid, the plaintiff cannot have two sets of books of accounts containing different, conflicting entries.

(c) Inasmuch as the Department has jurisdiction of plaintiff's security issues to the exclusion of the Commission, and since the books of the plaintiff kept in compliance with the Department's rules regulating accounting and its uniform system of accounts fulfill every convenience, requirement and necessity of the Commission in the discharge of its duties under the Federal Power Act, the plaintiff alleges that the jurisdiction over its primary, dominant and principal books of accounts is exclusively vested in the Department and that the Commission has no power and authority over such books of accounts and that Congress has not conferred and cannot constitutionally confer such power and authority.

37. Any disposition ordered and directed by the Commission of the $6,947,058.92, assigned by the Department to Account 100.5, or of any of the other items assigned by said supplemental staff report to Accounts 107 and 108.15 contrary to the disposition thereof ordered and directed by the Department would deprive the plaintiff of its property without due process of law in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and would be a failure to give full faith and credit to the public acts and judicial proceedings of the State of Arkansas and its governmental agencies in violation of the full faith and credit clause of Section 1 of Article IV of said Constitution.

38. Any changes or further adjustments made in plaintiff's primary, dominant and principal books of accounts at

the instance of the Commission, as proposed or put in issue by its orders (Exs. 7 and 9 hereto), will result in a change, adjustment, or alteration of plaintiff's electric rate base as established and fixed by said order of the Department (Ex. 2 hereto), and will deprive the plaintiff of its property without due process of law and will take its property for public use without just compensation in violation of Amendment V to the Constitution of the United States.

39. The plaintiff filed with the Commission a petition setting forth substantially the facts herein alleged, calling attention of the Commission to the dilemma confronting the plaintiff and asked the Commission (1) to cancel and set aside its order of September 27, 1944 (Ex. 7 hereto); or (2) that said order and the recommendations of the supplemental report of the Commission's staff be amended by narrowing the issues raised thereby to amounts and transactions arising out of plaintiff's acquisition of facilities actually used and useful in interstate commerce and by eliminating those issues with respect to items solely involving ice, water, gas, steam heat, transportation and local electric distribution and intrastate transmission properties. A copy of said petition is made a part hereof, marked Exhibit 8, and filed herewith.

40. The Commission failed to act upon said petition as requested by plaintiff and has by order of January 2, 1945 (Ex. 9 hereto) set the issues raised in its order of September 27, 1944 (Ex. 7 hereto) for hearing to be held at the Commission's Hearing Room, 1800 Pennsylvania Avenue N. W., Washington, D. C., on the 20th day of February, 1945. Copy of said order of the Commission, dated January 2, 1945, is made a part hereof, marked Exhibit 9, and filed herewith. The Commission by said orders has assumed the jurisdiction and power to consider, determine, and decide all of the issues raised both by said order (Ex. 9 hereto) and by its order of September 27, 1944 (Ex. 7 hereto) and said supplemental staff report (Ex. 6 hereto) and will, unless restrained by this court, proceed to consider

and determine said issues and will direct and order
11 the plaintiff not only to dispose of the items established by said supplemental staff report (Ex. 6 hereto) in Accounts 107 and 108.15, but will ascertain and fix the original cost of plaintiff's electric facilities, and of all its other properties, and will order and direct the plaintiff to record such amounts so fixed and their disposition in its primary, dominant and principal books of accounts, in the doing of any of which the Commission will exceed any power or authority conferred upon it by Congress or any power or authority possessed by Congress. In this connection, plaintiff believes and therefore alleges that such a hearing will continue over a period of several weeks, will require the attendance in Washington of its principal executives and a number of its employees at a time when their services are urgently necessary in the operations of plaintiff's property during a period of national emergency and will require the expenditure by the plaintiff of approximately $100,000.00.

41. In the event it should be determined that the sole, exclusive, and primary jurisdiction to supervise and regulate the entries made in plaintiff's primary, dominant and principal books of accounts lies with the Commission and not with the Department, the plaintiff alleges that the action of the Department in determining the original cost of plaintiff's property, the excess of the recorded cost thereof over its original cost, and the disposition of said excess, as made by said Department in its said order (Ex. 2 hereto), and the direction that said disposition should be entered on plaintiff's primary, dominant and principal books of accounts, is void and of no force and effect, was an assertion and exercise of power by the Department in violation of the Commerce Clause of Article I of the Constitution of the United States and that all of the Department's said actions are therefore void and of no force and effect.

42. The plaintiff verily fears and believes, and so believing avers (1) that the Commission will proceed with its hearing and will issue an order substantially in accord with the recommendations of said supplemental staff report, by which plaintiff will be required to reverse and readjust the entries made in its primary, dominant and principal books of accounts as approved or directed to be made by the Department; (2) that if plaintiff attempts to comply with the order and direction of the Commission, the Department will proceed against the plaintiff as provided by the criminal statutes of the State of Arkansas and subject the plaintiff to the penalties therein provided, and (3) that, if plaintiff fails to comply with such order and direction of the Commission, the plaintiff will be subject to the penalties and forfeitures provided by the Federal Power Act.

43. The plaintiff therefore alleges that, under all the facts and circumstances hereinbefore set forth, it is entitled (a) to an order restraining the Commission and the members thereof from further proceeding with the Commission's proposed hearing in the cause pending upon its docket entitled, "In the matter of Arkansas Power & Light Company, Docket IT-5829," (b) to an interlocutory injunction to the same effect, and (c), upon final hearing, to a permanent injunction issued against the Commission and its members to the same effect as said restraining order, or, if the Commission is held to have jurisdiction over the plaintiff's primary, dominant and principal books of accounts to the exclusion of the Department and over the entries to be made therein, and that the Commission has exclusive jurisdiction to hear and determine each and every of the issues raised by said supplemental staff report (Ex. 6 hereto) and the Commission's orders of September 27, 1944, and January 2, 1945, (Exs. 7 and 9 hereto), that the Department and its members should be permanently enjoined from prosecuting the plaintiff under the laws of the
12 State of Arkansas for any failure to obey Act 324 of the General Assembly of Arkansas, approved

April 2, 1935, and the orders, rules and regulations of the Department.

Wherefore, Plaintiff Prays:

(1) That this court issue forthwith its temporary restraining order against the Commission and the defendant members thereof, their agents, assistants, deputies, and employees, and all persons acting or assuming to act under their direction, enjoining and restraining them, until the further orders of the court from proceeding further or taking any further action in a cause pending upon the docket of said Commission entitled, "In the matter of Arkansas Power & Light Company, Docket IT-5829";

(2) That a special court of three judges be constituted to hear and determine this cause pursuant to Sections 380 and 380a of Title 28 U. S. C. A.;

(3) That such restraining order be continued in force as an interlocutory injunction until final hearing and determination of this cause;

(4) That upon final hearing of this cause, the interlocutory injunction against the Commission and the defendant members thereof be made permanent;

(5) That upon final hearing, this court adjudge, decree and declare the rights and legal relations of the parties to the subject matter here in controversy as follows:

(a) That the exclusive jurisdiction of plaintiff's primary, dominant and principal books of accounts and of the entries made and to be made and of the amounts entered and to be entered therein is vested in the Department;

(b) That the Commission and its members have no power or jurisdiction to ascertain or fix the original or acquisition cost of any of plaintiff's electric facilities used exclusively in the intrastate transmission and distribution of electric energy and of its natural gas distribution, steam heat and transportation properties, or of its formerly owned ice manufacturing and water distribution properties;

(c) That the Commission and its members have no power or jurisdiction, by order or otherwise, to direct the plaintiff

to dispose of, charge off, or amortize out of its primary, dominant and principal books of accounts any items or amounts recorded therein representing the excess of recorded cost of property over the original cost thereof;

(d) That the Commission and its members have no power or jurisdiction, by order or otherwise, to direct the plaintiff to dispose of, charge off, or amortize out of its primary, dominant and principal books of accounts any items or amounts recorded therein representing the excess of recorded cost over the original cost of plaintiff's property not used in the transmission of electric energy in interstate commerce or in the sale of such energy in interstate commerce;

(e) That, if any section or paragraph of the Federal Power Act, and especially Sections 4 (b), 201 (a), 201 (b), 201 (c), 201 (d), 201 (e), 203 (a), 205 (a), 206 (a), 206 (b), 207, 208 (a), 208 (b), 301 (a), 302 (a), 304 (a), 309, 311, and Paragraph (13) of Section 3 of said Act, or either of them, is construed to give or grant to the Commission, or its members, power or jurisdiction (1) to regulate,
13 control, direct, and supervise plaintiff's primary, dominant and principal books of accounts; (2) to ascertain and fix the original cost of plaintiff's property mentioned in paragraph 5 (b) of this prayer; (3) to direct and order the disposition of the items or amounts, or any thereof aggregating the excess mentioned in either of paragraphs 5 (c) or 5 (d) of this prayer, said sections and paragraphs, as so construed, violate the Commerce Clause of Article I of the Constitution of the United States and Amendment X thereto; or

(f) That, in the event it should be held that the Commission and its members, and not the Department and its members, have exclusive jurisdiction over the plaintiff's primary, dominant and principal books of accounts and of the entries made and to be made and amounts entered and to be entered therein and adjustments thereof, the action of the Department, as evidenced by its order (Ex. 2 hereto)

with respect to the approval and direction of entries made and to be made in said books of accounts and the Arkansas statute purporting to authorize said action, violate the Commerce Clause of Article I of the Constitution of the United States and the said action of the Department, and the statutes purporting to authorize the same are void and of no force and effect; and

(g) That, in any event, this court declare, order and decree that to require the plaintiff to charge off or amortize out of its primary, dominant and principal books of accounts the amount of $6,947,058.92, determined by the Department to represent both arm's-length cost to plaintiff and the present value of existing assets would deprive the plaintiff of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and is therefore unwarranted and unauthorized;

(6) That plaintiff have all other and further relief to which, under the pleadings and the evidence it may be entitled.

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* * * * * * * * * *

Answer and Cross-Claim of the Department of Public Utilities of Arkansas and the Commissioners Thereof and Exhibits Thereto.

523 Filed Feb 16 1945

I

The Department of Public Utilities of the State of Arkansas and Charles C. Wine, A. B. Hill and Marvin Hathcoat, the commissioners thereof (hereinafter referred to collectively as the Department) enter their appearance in this cause. The Department voluntarily submits to the jurisdiction of the court in this cause for the reason that the complaint presents to this court for decision issues arising under the constitution and laws of the United States and the constitution and laws of Arkansas which, if decided adversely to the interests of the State of Arkansas, would destroy one of the fundamental powers of the State of Arkansas as will be more specifically set out in the Cross-claim hereinafter stated against the Federal Power Commission and its commissioners. It is to the best interest of the Department, and other state regulatory com-
524 missions, for such issues to be finally adjudicated and this cannot be done in this action unless the Department submits to the jurisdiction of the court.

Answer

II

The Department denies that the action of the Department in determining the original cost of plaintiff's prop-

erty, the excess of the recorded cost thereof over its original cost, and the disposition of the excess as made by the Department in its order (Pl. ex. #2) and the direction that the disposition should be entered in plaintiff's primary, dominant and principal books of accounts is void and of no effect as alleged in Paragraph 41 of the complaint.

The Department denies that it should be permanently enjoined from prosecuting the plaintiff under the laws of Arkansas for any failure on the part of the plaintiff to comply with Act 324 of the General Assembly of Arkansas, approved April 2, 1935, and the orders, rules and regulations of the Department as alleged in Paragraph 43 of the complaint.

The Department, therefore, prays that the complaint be dismissed as to any and all relief for which the plaintiff prays against this defendant and for such further general relief to which this defendant may be entitled.

Cross-Claim

III

For its cross-claim against the Federal Power Commission and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as commissioners thereof, (hereinafter referred to collectively as the Commission) the Department states:

525 IV

The Department was created by Act 324 of the General Assembly of the State of Arkansas, approved April 2, 1935. By the terms of the act, the Department is vested with power and jurisdiction, and it is charged with the duty, to supervise and regulate every public utility defined in the act and to do all things necessary or expedient in the exercise of its power or jurisdiction. The Department is empowered to make reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and to ascertain and fix the value of the property of any public

utility insofar as the same is material to the exercise of the jurisdiction of the Department. The Department is empowered to establish uniform systems of accounts to be kept by any public utility subject to its jurisdiction and to prescribe the manner in which such accounts shall be kept. The Department was given broad and comprehensive powers and was established by the legislature to act for it, and it has the same power the legislature would have to regulate public utility companies operating in Arkansas.

V

Plaintiff is an Arkansas Corporation. With a very minor exception, all of its property is located in Arkansas. All of plaintiff's business is transacted in Arkansas and plaintiff is a public utility subject to the jurisdiction of the Department under the terms of Act 324 of 1935. Plaintiff has been subject to the jurisdiction of the Department since April 2, 1935, the date of the approval of Act 324. By its order of July 2, 1937, the Department actually took and has since retained jurisdiction of the plaintiff. The purpose of the order of July 2, 1937, was to determine the reasonableness and lawfulness of all rates, rules, practices,
526 regulations and contracts applicable to plaintiff's electric service in Arkansas and if any thereof was found to be unreasonable, unjust or otherwise unlawful to determine and fix reasonable, lawful, and just rates, rules, regulations and contracts to be charged, collected and observed. A copy of the order is made a part hereof and designated as Department's Exhibit 1. The Department has continued its investigation and supervision of plaintiff since the issuance of its order of July 2, 1937.

VI

On November 10, 1943, the Department issued its order directing that a hearing be held to establish the fair and reasonable rate base and rate of return thereon with respect to plaintiff's electric property used and useful in

the public service and to fix reasonable rates to be charged thereafter by plaintiff. Plaintiff was directed to show cause why the original cost of its electric property, less accrued depreciation, should not be established as the electric rate base and why plaintiff's books and accounts should not be adjusted to conform to the Department's uniform system of accounts. Plaintiff was further ordered to show cause why it should not be required to write out of its accounts amounts which did not reflect actual value. A copy of the Department's order of November 10, 1943, is filed herewith as Department's Exhibit 2.

VII

Plaintiff filed its response to Department's order of November 10, 1943, and thereafter extensive hearings were held before the Department relating to all the issues raised by the Department's order. As a result of such hearings, the Department entered its order of June 24, 1944, (Pl. ex. #2). In its order of June 24, 1944, the Department found, among other things, that the books, records and accounts prescribed by the Department shall be the official corporate accounts and records of the plaintiff. The order of
527 the Department was affirmed by a judgment of the Circuit Court of Pulaski County, Arkansas, the court having jurisdiction under the laws of Arkansas to review such order (Pl. ex. #3).

VIII

Pursuant to the order of the Commission dated May 11, 1937, and pursuant to Electric Plant Instruction 2-D of the Commission's uniform system of accounts, the Company filed with the Commission in May 1940 a report of its studies relative to the reclassification of its Electric Plant accounts as of December 31, 1936. Thereafter the staff of the Commission made an investigation of the Company's report. The Department, at the request of the Commission, assigned members of its staff to participate in the investi-

gation made by the staff of the Commission. This investigation was completed in June 1942. The then chief accountant of the Department was requested by the Commission to join in the report filed by its staff; but he declined to do so for the reason that, although he was in agreement with the report as a whole, he could neither approve nor disapprove the individual items of adjustment or their inclusion in the particular account to which they had been assigned in the report of the Commission's staff.

IX

On June 15, 1943, the Commission, under its Docket IT-5829, ordered the plaintiff to show cause why the Commission should not direct the plaintiff to make certain adjusting entries in its records and accounts. On September 18, 1943, plaintiff filed its response to the Commission's order of June 15, 1943.

X

The hearing before the Commission pursuant to its order was postponed by the Commission several times
528 pending the outcome of the hearing which was then being conducted by the Department. In the meantime, the staff of the Commission had been engaged in making further studies of the Company's report. On September 27, 1944, the Commission issued its "Supplemental Order to Show Cause" in its Docket IT-5829 in which the Company was directed to file a response "to the recommendations contained in the supplemental report of the Commission's staff." The hearing pursuant to this order has been set for February 20, 1945.

XI

By its orders and proceedings under its Docket IT-5829, the Commission is asserting power to regulate and control the official corporate records of the plaintiff and to require plaintiff to write out of its accounts and records amounts which the Department has found, after extensive investiga-

tion and hearings, to represent actual value. The Commission is asserting its power under the provisions of section 3, paragraph 13, section 4 (b), section 301 (a), section 304 (a) and section 309 of the Federal Power Act.

XII

The jurisdiction of the Commission under the provisions of the Federal Power Act is limited to those matters which have a direct relation to and bearing upon the transmission and sale of electric energy in interstate commerce. The original cost of plaintiff's electric plant as determined by the supplemental report of the Commission's staff is only $254,160.33 less than such original cost as established by the Department's order of June 24, 1944, and such difference could have no appreciable effect upon the establishment of wholesale rates in interstate commerce over
529 which the Commission has jurisdiction. The establishment and disposition of amounts in Account 107 and Account 108.15 as determined by the Commission's staff have no relation to or bearing upon the power of the Commission to regulate the transmission and sale of electric energy at wholesale in interstate commerce. The classification of the Company's accounts and the adjustments made by the Company pursuant to the Department's order of June 24, 1944, as now reflected by the official corporate records of the Company furnish adequate and complete information and records necessary for the Commission to exercise its limited jurisdiction conferred upon it by the Federal Power Act.

XIII

The business conducted by the Company is so intimately related to the local welfare of the people of Arkansas that the public interest demands that conflict be avoided and that federal power should not be exercised unnecessarily or harshly and that the demands of comity and courtesy be deferred to. In its effort to vacate and nullify the Department's order of June 24, 1944, the Commission is acting ar-

bitrarily and unreasonably and such act by the Commission is neither necessary nor appropriate in the proper administration of the Commission's jurisdiction under the Federal Power Act.

XIV

The supervision and regulation of the official corporate books and records of the plaintiff is essential to the sovereign duty of the State of Arkansas, acting through the Department, to advance the safety, happiness, prosperity and general welfare of the people of Arkansas; and the power of the State of Arkansas in this respect is complete and exclusive. The asserted jurisdiction of the Commission over the official corporate books, accounts and records of
530 the plaintiff constitutes an unwarranted and illegal attempt by the Commission to dictate to the State of Arkansas what its internal policy shall be with respect to public utilities operating exclusively in the State of Arkansas.

XV

The accounting entries recorded in plaintiff's official corporate records and accounts pursuant to the Department's order of June 24, 1944, were made under the power and jurisdiction of the State of Arkansas reserved to the State under Amendment No. 10 to the Constitution of the United States, and Congress is without power to confer on the Commission any authority or jurisdiction whatsoever over the official corporate records of the plaintiff.

XVI

To the extent that the Federal Power Act undertakes to confer upon the Commission any authority or jurisdiction over the official corporate accounts and records of the plaintiff, such act is unconstitutional and void for the reason that such grant of power by Congress is beyond the limited power conferred upon it by the Constitution and such grant of power, and the exercise thereof by Congress, would trespass upon the rights of the people of Arkansas in violation

of the express terms of Amendment No. 10 to the Constitution of the United States.

XVII

The proceeding before the Commission in its Docket IT-5829 is, in effect, an attempt by the Commission to vacate and set aside the deliberate judgment of the State of Arkansas as to what will best serve the general welfare of its people in the administration of its regulatory power, and is an unwarranted denial of the full faith and credit to
531 which the laws of Arkansas and the judgment of its courts are entitled under section 1 of Article IV of the Constitution of the United States. The proceedings of the Commission constitute a primary step on the part of Congress, acting through the Commission, to assume unlimited power to supervise, control and regulate the intrastate, as well as the interstate, business of public utilities operating exclusively in the State of Arkansas and thus to undermine, subvert and ultimately destroy one of the fundamental and most sacred principles of state government; and the power asserted by the Commission in so doing contravenes the provisions of Article IV, section 1 of the Constitution of the United States.

XVIII

By the terms of Act 324 of the Acts of 1935, the Department has exclusive power to supervise, regulate, restrict, and control the issuance of stock, stock certificates, bonds, notes, and other evidences of indebtedness by the Company and other public utilities incorporated under the laws of Arkansas. Pursuant to such authority, the Department has approved the issuance of securities by the Company based upon values which the Department has found to exist in the Company's capital structure. The Commission proposes by its order to require the Company to write out of its accounts certain amounts which this Department has found to represent value and such finding by the Department forms the basis for the Department's order approving

the issuance of securities by the Company. The action of the Commission in causing the Company to write out of its accounts amounts found by the Department to represent value will be in violation of the order of the Department approving the issuance of such securities and in violation of the Department's exclusive jurisdiction over the issuance of such securities.

532 XIX

The Department is informed and believes, and, therefore, alleges, that the proceedings before the Commission under its Docket IT-5829 will last for a period of from three to six weeks and will be conducted in Washington D. C. In the performance of its statutory duties, at least one member of the Department and several members of the Department's staff will be required to attend and participate in such hearing. All of which will cause the Department to incur considerable expense and will adversely affect the ability of the Department to perform its other statutory duties during the period of such hearing. No corresponding benefit will result in exchange for this expenditure of funds and the temporary inability of the Department to properly discharge its statutory duties.

XX

In the Department's order of June 24, 1944, (Pl. ex. #2) the Department established the rate base applicable to the electric property of the plaintiff as of January 1, 1944, and also established the fair annual return allowable on the rate base so established. The order further provides the method by which the rate base can be determined at future dates by certain calculations based upon the official corporate accounts of the plaintiff as determined by the Department in its order. The order further provides that for a period of up to two years following the cessation of hostilities involving this country plaintiff shall accumulate all amounts representing the excess of its net electric operating revenue over its base allowable return in a fund designated as "Ex-

cess Net Electric Revenue Deferred Credit Fund." At the expiration of the specified period the amount credited
533 to such fund will be prorated between the plaintiff and its electric customers in the ratio set forth in the order.

XXI

The Department is advised and believes, and therefore alleges, that plaintiff will be required to expend not less than $100,000.00 if it is required to defend the proceedings now pending before the Commission under its Docket IT-5829. If the plaintiff is relieved of the necessity of incurring such expense, the amount which it would be required to expend will be credited by plaintiff to the "Excess Net Electric Revenue Deferred Credit Fund" and a major portion thereof will ultimately be refunded to plaintiff's electric customers as provided in the Department's order. The Department alleges, therefore, that the asserted power of the Commission is a direct invasion of the rights of plaintiff's electric customers and it is the statutory duty of the Department to prevent the invasion of such rights by the Commission.

XXII

Wherefore, the Department prays that (a) temporary restraining order be issued restraining the Commission and the members thereof from taking any further action in the case pending on the Docket of the Commission entitled "In the Matter of Arkansas Power & Light Company, Docket IT-5829;" which will be in conflict with the power and jurisdiction of the Department over the official corporate books and accounts of the plaintiff or with the orders heretofore rendered by the Department with respect to such official corporate books and accounts; (b) an interlocutory injunction be entered pending final hearing in this cause; (c) upon final hearing the restraining order be made permanent; (d) that a declaratory judgment be entered by the court to the effect that the exclusive jurisdiction to regulate, supervise
534 and control the official corporate records and accounts

of the Company is vested in the State of Arkansas and the Department to the exclusion of the Commission; and (e) for such further relief against the Commission and the members thereof as the Department may be entitled in the premises.

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Exhibit No. 1 to Answer and Cross-Claim.

535 Filed Feb 16 1945

State of Arkansas

Department of Public Utilities

At a session of the Department of Public Utilities, held in Little Rock, Arkansas, on the 2nd day of July, 1937.

Present: Thomas Fitzhugh, Chairman
H. W. Blalock
Max A. Mehlburger,
Commissioners

Docket No. 225

In the Matter of the General Investigation on Motion of the Department of Electric Operations of Arkansas Power & Light Company.

Order

One of the duties incumbent upon this Department is to establish rate bases for the various companies operating under its jurisdiction. Where a company operates several separate utilities it is necessary to fix rate bases for each utility operation. The rate base, when fixed by the Department, is the amount upon which the company is allowed a rate of return. The rate base is determined after a detailed study of a company's properties and operations. Every claim of value by the company is examined by the Department's technical staff of engineers and accountants to determine the actual value. Actual physical inventory of every piece of property used and useful to the utility consumers is made in determining a rate base.

The Arkansas Power & Light Company has never had a rate base of any of its utility operations established for it by this Department. It being the largest utility company in extent of operations, supplying electric service in fifty-five counties, 154 communities, and to 65,283 electric customers in the state, the Department feels that a great benefit would result both to the utility consumers and the company itself if it immediately proceeds with the necessary invesigations to establish a rate base for its electric utility operations.

Proper and adequate regulation can be accomplished only when the company's accounts are kept in such a manner that the properties of a utility company can be allocated to the various utility operations. Furthermore, the accounts should separate properties and costs of production, transmission and distribution of the utility service. Where production and transmission costs can be determined, separate adjustments can be made in individual communities without a system-wide rate investigation.

The Arkansas Power & Light Company has not furnished the Department with accounts in sufficient detail for adequate regulation. For instance, out of a fixed property account of $65,566,815, there is $43,208,942 which is either unclassified or not allocated to any particular utility service

That is, the Department has no way of knowing at present in which phase of the utility service this unclassified property is used and useful. Consequently, neither the Department nor the Company can determine costs of electric service until the properties used in electric service are separated from the other utility property of the company.

Furthermore, the Department cannot know the cost of delivering electric energy to any city gate until the electric property accounts are broken down to show separately production and transmission costs.

Companies are entitled to rates sufficiently high to earn a fair rate of return on the fair value of the property used and useful in rendering the service. The Department cannot determine the fairness of the present rates of this Company until it knows the fair value of the property, its revenues, operating expenses, and other pertinent facts.

536 The Department does not know that the fixed capital account set up on the company's books is correct. The Federal Trade Commission reported in 1932 a write-up of $6,957,913 over the book accounts of the properties acquired by the Arkansas Power & Light Company prior to consolidation in 1926. The Department believes a thorough investigation of all the company accounts should be made to determine present value of properties for rate-making purposes.

The Company's gross income has increased from $6,989,-021 in 1933 to $8,061,946 in 1936. The gross income for the present year will be probably the largest in the history of the Company. The Company is adding to the present capacity in Little Rock and has recently completed a contract with the Tennessee Valley Authority for additional power in order to be able to comply with increasing demands for power. Electric utility unit costs decrease with fuller utilization of properties. The Department believes that electric rates should be lowered as costs decline. Therefore, an investigation should be made to determine the feasibility of a rate reduction.

The state is looking forward at present toward a period of rapid industrial and commercial development. Electric rates will play an important part in the development of commerce and industry in Arkansas. Our neighbor southern states are enjoying low electric rates due to the influence of Tennessee Valley Authority. If Arkansas is to keep abreast of the development taking place in other southern states, electric rates in Arkansas must be kept as low as consistent with costs.

Furthermore, the Department believes that any benefits arising out of contracts made by a private company operating in Arkansas with Tennessee Valley Authority should accrue to all the consumers in Arkansas.

It Is Therefore Ordered:

1. That on motion of the Department a system-wide investigation of the electric utility operations of the Arkansas Power & Light Company be started immediately.

2. That Dockets numbers 4, 4A and 101 are hereby consolidated in this cause.

3. That the Engineering and Accounting Divisions proceed at once in their investigations of this Company.

By Order of the Department.

(Signed) J. T. Horner, Jr.
Secretary.

Exhibit No. 2 to Answer and Cross-Claim.

537 Filed Feb 16 1945

State of Arkansas

Department of Public Utilities

At a session of the Department of Public Utilities held in its offices, State Capitol, Little Rock, Arkansas, on November 10, 1943.

Present: A. B. Hill, Chairman
Marvin Hathcoat,
Joseph Morrison,
Commissioners

Docket No. 225

IN THE MATTER OF THE GENERAL INVESTIGATION ON MOTION OF THE DEPARTMENT OF ELECTRIC OPERATIONS OF ARKANSAS POWER & LIGHT COMPANY.

Order

The Department, on its own motion, on July 2, 1937, entered an order in this Docket directing a system-wide investigation of the electric utility operations of the Arkansas Power & Light Company (hereafter referred to as Respondent) to be made by its various technical divisions. The Department, by subsequent orders, directed Respondent to file a detailed inventory, appraisal and audit of its electric operations. These have been filed with the Department. It is the settled policy of the Department to secure the lowest rates that are consistent with a fair return on the fair value of the electric property of Respondent used and useful in public service.

Since the issuance of its order on July 2, 1937, the Respondent, in pursuance to subsequent departmental orders, has made a number of substantial reductions in its electric rates. The last of such orders was issued November 7, 1942, and resulted in a customer refund of $625,000.

For the period of the war emergency, the Department adopted a policy of customer refunds to take care of excess earnings in order to eliminate rate base investigations which are always costly, both in manpower and money. Such investigations are slow in reaching the desired result which is the lowest rates to consumers consistent with the fair return upon the fair value of properties used and useful in public service.

On October 7, 1943, the Department requested information from the Respondent to permit it to determine the amount of refund to be made to Respondent's customers out of 1943 revenues. To this request the Respondent, through its President, advised the Department by letter "* * * This matter of refund is an idea and suggestion with which our Company cannot go along * * *". The Department, therefore, deems it advisable to proceed immediately to the final determination of the fair value of the Respondent's electric properties used and useful in public service, of the revenues of the Respondent and their relation to said fair value and of the expenses incurred in Respondent's operations.

It appears that the Respondent, in pursuance of an order of the Federal Power Commission directed to it, has made certain studies relating to the original cost of its electric properties and to the reclassification of such original cost under the system of accounts of the Federal Power Commission and has filed same with the Federal Power Commission. It appears that the reclassification studies and statements filed by Respondent with the said Federal Power Commission would be of material assistance to its investigation of Respondent's properties and operations, although the uniform system of accounts previously adopted by this Department differs in some details from the uniform system of accounts adopted by the Federal Power Commission.

It Is Therefore Ordered:

That a hearing be held in the offices of the Department of Public Utilities in the State Capitol, Little Rock, Ar-
538 kansas, beginning on the 7th day of December, 1943, at 10:00 A. M., before the Department for the purpose

of determining and establishing a fair and reasonable rate base and the rate of return thereon, conforming thereto with respect to Respondent's electric properties used and useful for public service within the State of Arkansas, and to find and affix reasonable rates to be thereafter received, demanded, or enforced by the Respondent; and in the event such reasonable rates be less than these now received by Respondent, that it be ordered that the same be effective from and after January 1, 1943, and the excess, if any, over the rates currently charged, be refunded by the Respondent to its rate payers.

The Respondent is directed to show cause, if any it may have, why the Department should not establish the original costs of Respondent's electric properties, less accrued depreciation, as the rate base of Respondent's electric properties used and useful in its electric operations devoted to public service and to affix the fair return received therefrom.

Respondent ie ordered to show cause at such hearing why it should not be required by the Department to adjust its accounts to conform to the uniform system of accounts adopted heretofore by the Department and to write out or charge off any item or items carried in its books of account which do not reflect actual values.

The Respondent is ordered and directed to make full and complete disclosures at such hearing of all the matters pertinent to the inquiry including, but not limited to:

(a) All studies relating to the original cost of its electric properties and to the reclassification of such costs under the system of accounts of the Federal Power Commission which it has heretofore filed with said Commission, together with copies of all correspondence that has passed between the Respondent and the Federal Power Commission.

(b) All elements of value of the properties used and useful in electric operations devoted to public service in Arkansas.

(c) Respondent's operating expenses with respect to its said properties.

(d) Revenues and their relation to the value of the properties used and useful in public service.

(e) Whether or not there be any items on Respondent's books of accounts which do not reflect actual values.

(f) Fair and reasonable return with respect to such properties.

(g) Reasonable rates to be received, demanded or enforced by Respondent in respect to such properties.

By Order of the Department, this 10th day of November, 1943.

(Signed) ZELLA PASSE
Secretary

* * * * * * * * * *

Motion to Dismiss the Complaint and the Cross-Claim

539 Filed Mar 20 1945

The defendants, the Federal Power Commission, and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of said Commission, and each of said defendants, respectfully move the Court to dismiss the complaint and the cross-claim herein for the following reasons:

(I) This Court does not have jurisdiction over the subject matter, in that:

(A) The provision of the Federal Power Act for review of the Commission's orders in United States Circuit Courts of Appeals is exclusive and this Court has no jurisdiction.

(B) Such action as the Commission has taken is procedural and interlocutory, and not subject to judicial review.

(C) The plaintiff and the cross-claimants have not exhausted their administrative remedies and accordingly are not entitled to judicial relief.

540 (II) No claim is stated upon which relief can be granted, since the Commission's accounting authority with respect to "public utilities" including plaintiff, is not affected by any accounting requirements prescribed under State law.

(A) The provisions of the Act are dispositive of the question here sought to be raised.

(B) The question sought to be raised has been settled by the uniform decisions of the courts, including that of the Supreme Court in *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119.

Wherefore the defendants above named pray that the complaint and cross-claim herein be dismissed, and that oral argument be had on this motion.

Respectfully submitted,

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HOWARD E. WAHRENBROCK,
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Attorneys for defendants, Federal Power Commission and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of the Federal Power Commission.

* * * * * * * * * *

Memorandum Opinion

541 Filed Jun 6 1945

This is an action against the Federal Power Commission (Commission) and its Commissioners, and the Department of Public Utilities of the State of Arkansas (Department) and its Commissioners.

The complaint seeks (1) an injunction to restrain the Federal Power Commission from taking further action in a proceeding, now on its docket, entitled "In the Matter of the Arkansas Power & Light Company," plaintiff herein, and (2) a declaratory judgment that the exclusive jurisdiction over plaintiff's primary books of accounts and of the entries made and to be made therein is vested in the Department of Public Utilities of the State of Arkansas, defendant herein, and other related declaratory relief. Plaintiff admits that it is a public utility, subject to the jurisdiction of the Commission. The Department and its Commissioners have answered and filed a cross-claim seeking relief similar to that sought by plaintiff They have not intervened, nor sought to intervene, in the proceeding above referred to, now on the docket of the Commission. The Federal Power Commission and its Commissioners have moved to dismiss the complaint and the cross-claim.

542 Sec. 313(b) of the Federal Power Act, 16 U. S. C. A. 825 *l*, provides that any party to a proceeding under this Act, aggrieved by an order issued by the Commission in such proceeding, may obtain a review of such order in an appropriate Circuit Court of Appeals, by filing in such court a written petition praying that the order of the Commission be modified or set aside. This method of judicial review is exclusive. *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159; *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800, 804 (C. C. A. 3d) cert. denied, 316 U. S. 663; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 48-50; *Miles Laboratories* v. *Federal Trade Commission*, 78 U. S. App. D. C. 326, 328, cert. denied, 322 U. S. 752; *Black River Valley Broadcasts, Inc.* v. *McNinch et al.*, 69 App. D. C. 311, 314, cert. denied, 307 U. S. 623. The Federal Declaratory Judgment Act, 28 U. S. C. A. 400, does not confer upon the court jurisdiction which it does not otherwise possess. *Miles Laboratories* v. *Federal Trade Commission*, supra; *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 100 (C. C. A. 5) cert. denied, 299 U. S. 559 This court therefore

does not have jurisdiction over the subject-matter of the complaint.

The cross-claim is governed by the same principles. The Department and its Commissioners cannot escape them by failing to seek relief in the proceeding now pending on the Commission's docket, about which they complain. This they may do by filing a petition for intervention.

If they are allowed to intervene and are aggrieved by an order thereafter issued by the Commission, they may obtain a review of such order as set forth in Sec. 313(b) of the Federal Power Act, supra. If they petition to intervene and their petition is denied, they may obtain a review of such order denying their petition under Sec. 313(b) supra. Moreover, it should be pointed out that the administrative remedies under the Federal Power Act have not been exhausted, and "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over
543 the subject-matter." *Myers* v. *Bethlehem Shipbuilding Corp.*, supra; *Miles Laboratories* v. *Federal Trade Commission*, supra.

Finally, the substantive question raised by the plaintiffs and cross-claimants appears to have been settled adversely to their contention. *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119.

The motion of the Federal Power Commission and its Commissioners to dismiss the complaint and cross-claim therefore will be granted. Counsel for the Commission and its Commissioners will submit, on notice, appropriate order.

DAVID A. PINE,
Justice

June 6, 1945

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544 Filed Jun 14 1945

Order Dismissing Complaint and Cross-Claim

This cause came on to be heard on May 16, 1945, upon the motion of the defendants, Federal Power Commission, and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of said Commission, to dismiss the complaint and cross-claim herein upon the grounds that this Court does not have jurisdiction over the subject matter and that no claim is stated upon which relief can be granted; and the questions presented having been argued by counsel for the respective parties, as well as the Attorney General of the State of Arkansas appearing as *amicus curiae*, the issues involved were submitted to the Court for consideration and decision; and after due deliberation to the Court on June 6, 1945, delivered and filed its memorandum opinion wherein it was found and directed that the motion of said defendants be granted; wherefore, it is, this 14th day of June, 1945,

Ordered, Adjudged and Decreed that the said motion be and the same is hereby granted, and that the complaint and cross-claim herein be and the same are hereby dismissed as to the defendants, Federal Power Commission, and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of said Commission, for the reasons set forth in said memorandum opinion.

DAVID A. PINE,
Justice

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Notice of Appeal

546 Filed Sep 13 1945

Notice is hereby given this thirteenth day of September, 1945, that Arkansas Power & Light Company, plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from that portion of the final judgment of this Court entered on the fourteenth

day of June, 1945, which dismissed the complaint as to the defendants, Federal Power Commission, and Basil Manly, Leland Olds, Claude L. Draper, Nelson Lee Smith and John W. Scott, as Commissioners of the Federal Power Commission.

VIRGINIA COLLINS DUNCOMBE
701 Union Trust Building
Washington 5, D. C.
Attorney for Plaintiff,
Arkansas Power & Light Company

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547 **Memoranda**

September 13 1945

Copy of notice of appeal mailed by clerk to Shannon & McAllister.

Bond ($250.00) of Plaintiff on appeal approved and filed.

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WEDNESDAY, FEBRUARY 13TH, A. D. 1946

* * * * *

Before Honorable BENNETT CHAMP CLARK, WILBUR K. MILLER, Associate Judges, and JAMES W. MORRIS, Associate Justice, District Court of the United States for the District of Columbia, sitting by designation

* * * * *

No. 9125. January Term, 1946

ARKANSAS POWER & LIGHT COMPANY, APPELLANT

vs.

FEDERAL POWER COMMISSION, ET AL., APPELLEES

On motion of Mr. Spencer Gordon, Messrs. P. A. Lasley of the Bar of the Supreme Court of Arkansas and A. J. G. Priest of the Bars of the Court of Appeals of New York and Supreme Court of Idaho were permitted to argue for appellant pro hac vice by special leave of Court.

On motion of Mr. Howard C. Kilpatrick, Mr. Cleveland Holland of the Bar of the Supreme Court of Arkansas was permitted to argue as amicus curiae pro hac vice by special leave of Court.

Argument commenced by Mr. P. A. Lasley, attorney for appellant, continued by Messrs. Cleveland Holland as amicus curiae and Lambert McAllister, attorney for appellee, and concluded by Mr. A. J. G. Priest, attorney for appellant.

* * * * *

Opinion

United States Court of Appeals, District of Columbia

No. 9125

ARKANSAS POWER & LIGHT COMPANY, APPELLANT

v.

FEDERAL POWER COMMISSION, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

* Argued February 13, 1946—Decided June 28, 1946

Messrs. P. A. Lasley, of the Bar of the State of Arkansas, and A. J. G. Priest, of the Bar of the State of New York, pro hac vice, by special leave of Court, with whom Mrs. Virginia C. Duncombe was

on the brief, for appellant. Mr. Spencer Gordon also entered an appearance for appellant.

Mr. Cleveland Holland, Assistant Attorney General of the State of Arkansas, of the Bar of the State of Arkansas, pro hac vice, by special leave of Court, with whom Mr. H. Cecil Kilpatrick was on the brief, for the State of Arkansas as amicus curiae, urging reversal.

Mr. Lambert McAllister, Special Counsel, Federal Power Commission, with whom Mr. Howell Purdue, Senior Attorney, was on the brief, for appellee Federal Power Commission. Messrs. Howard E. Wahrenbrock, Assistant General Counsel, and Louis W. McKernan, Principal Attorney, Federal Power Commission, entered appearances for appellee Federal Power Commission.

Before CLARK and WILBUR K. MILLER, Associate Justices, and JAMES W. MORRIS, District Judge.*

WILBUR K. MILLER, J.: This appeal may be summarized as a request for the answer to a single question: is the Arkansas Power & Light Company entitled, in a suit for a declaratory judgment, to a judicial determination as to whether the Federal Power Commission or the Arkansas Public Service Commission has exclusive regulatory control over its official corporate accounting records?

It should be noted at the outset that we are not now concerned with deciding which commission possesses the exclusive right of control which both claim; consequently we are not presently confronted with the problem of interpreting the federal and state statutes involved, in order to decide which commission has the paramount power. Our task is simply to ascertain whether the complaint exhibited a justiciable controversy properly cognizable under the Declaratory Judgment Act.[1] That is to say, this appeal does not present for review a judgment of the lower court holding that either this or that commission has sole regulatory authority over the company's official corporate accounts; for the District Court did not reach that question. The order from which this appeal is taken went only so far as to dismiss the complaint[2] "upon the grounds that this Court does not have jurisdiction over the subject matter and that no claim is stated upon which relief can be granted."

Difficulty in considering this matter is avoided if it be borne constantly in mind that the case does not have to do with bookkeeping entries or accounting problems as such. The purpose of the suit is merely to find which commission has the sole, exclusive right of regulatory control over the official accounts. As far as the declaratory

*Sitting by designation.

[1] 49 Stat. 1027, Judicial Code § 274 (d), 28 U. S. C. A. 400.

[2] The order also dismissed the cross-claim of the Department of Public Utilities of Arkansas (now Arkansas Public Service Commission) but the cross-claimant did not appeal.

judgment sought is concerned, the complaint does not challenge the correctness of, or justification for, any order of either commission with respect to the manner of recording transactions on the company's books, or the allocation of items among prescribed accounts, or the disposition of amounts recorded in various accounts. It is necessary, therefore, in the consideration of this appeal, sharply to distinguish between a judicial review of the manner in which the regulatory control has been exercised, which this case does not involve; and, on the other hand, a judicial determination as to whether the federal commission or the state commission has the right under the law to exercise paramount regulatory supervision and control over official accounting records, which is the relief invoked here.

This case is not like those in which the courts, including the Supreme Court, have permitted two commissions, each having authority in the premises, to require a utility company to keep different sets of accounts, one to accord with the requirements of one commission, and another to meet the requirements of the other commission.[3] For those cases do not deal with a conflict between jurisdictions over the sole right to prescribe official accounting methods, and go no further than to point out the right of a second commission to demand memorandum accounts to suit its purposes, which may differ from the accounts required by another commission which also has authority in the premises.

Here the company asserts its willingness to keep two differing sets of accounts in obedience to the dictates of the two commissions to which it is subject; but it alleges that this will satisfy neither commission, as both assert the right to require the company to keep its dominant, principal, primary and basic accounts[4] in the manner specified by it. It is charged that each commission claims the authority, exclusive of the other, to require the company to keep, not just a set of memorandum accounts in the manner dictated by it, but official corporate accounts and records such as it prescribes. This would involve no practical difficulty if the requirements of the two commissions were identical; but when, as here, the two regulatory bodies insist on divergent and inconsistent action on the part of the company concerning the same subject matter, it is apparent that somehow the conflicting claims to the same right of control should be reconciled.

The confusion as to the issues which is apparent in the briefs filed with us should be dispelled by the realization that a public utility cannot keep more than one set of actual, official corporate accounts.

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[3] Alabama Power Co. v. Federal Power Comm'n, 75 U. S. App. D. C. 315, 128 F. (2d) 280; Hartford Electric Light Co. v. Federal Power Comm'n, 131 F. (2d) 953; Northwestern Electric Co. v. Federal Power Comm'n, 321 U. S. 119; Pacific Power & Light Co. v. Federal Power Comm'n, 141 F. (2d) 602.

[4] These accounts are referred to throughout this opinion as the official corporate accounts.

Neither can any other corporation, for that matter. There must always be an official recording of figures to represent the actualities of the business, to constitute the genuine record of stewardship, the basis upon which representations are made as to the real results of the utility's operations and its true financial condition in reports to stockholders and to the public, and in financial statements to be submitted to prospective investors or creditors. Merely to state this preposition is to demonstrate its soundness, since any reasonable mind immediately perceives that actual transactions can be truly reflected by only one set of figures. A differing set shows only a hypothetical situation, demonstrating the distinction between what is, and what might have been.

Of course it is readily apparent that a public utility can prepare and submit, whenever necessary or required, pro forma accounts, showing what its status would have been had entries been recorded in its books other than those which actually were made; or what the result would have been had various items been placed under headings other than those under which they were actually placed in the official records; or what the situation would have been had this or that capital asset been eliminated by a charge to surplus or annual amortizing charges against earnings. Such alternative accounts are simply in the nature of memoranda, and can never be said to be the official corporate records.

But when a regulatory commission asserts the right to command that an item which another commission, also claiming jurisdiction, has treated as a valuable asset, be charged to surplus or amortized through charges to earnings, the commission which asserts such right to command unquestionably is saying that accounts kept in response to its orders must be, not mere memoranda, but the official corporate records. Such action goes beyond a claim of authority to make bookkeeping or accounting requirements, and touches actual property rights. In such circumstances, a utility should be able to learn from a declaratory judgment which commission has exclusive jurisdiction.

So it is necessary to examine the record to ascertain whether the nature of the appellant's property and business operations is such as to stamp it as a utility under the Arkansas regulatory act, and under the Federal Power Act as well, and consequently subject to regulation by both state and federal commissions. If so, then we must see if the record discloses each commission to be claiming, to the exclusion of the other, the power to dictate and supervise official books of accounts. For if such conflicting claims are shown to exist, the two applicable statutes should have been reconciled by the District Court in a declaratory judgment.

Arkansas Power & Light Company is a public utility, incorporated under the laws of Arkansas and engaged in the business of

generating, distributing and selling electric energy to consumers, and at wholesale to others who resell the energy. It owns no property and does no business outside of Arkansas with the exception of a small distribution extension into Louisiana. Ninety-eight percent of its electric facilities are used solely for the generation and distribution of energy to consumers. All of its wholesale deliveries are made in Arkansas. Less than two percent of the company's electric facilities are used exclusively in the transmission of electric energy sold at wholesale in interstate commerce for resale.

Because the entire business of the appellant is transacted in Arkansas, and 98 percent of its electric facilities are employed in a purely intrastate service of electric energy to consumers, it is a public utility subject to the jurisdiction of the Arkansas Public Service Commission under the provisions of Act 324 of the General Assembly of 1935. By its order of July 2, 1937, the state commission actually took and has since retained jurisdiction of the appellant's business. The state commission's order of that date was for the purpose of determining whether the rates, rules, practices, regulations and contracts of the appellant concerning electric service in Arkansas were reasonable and lawful. On November 10, 1943, the state commission directed that a hearing be held to establish the fair and reasonable rate base, and rate of return thereon, with respect to the appellant's electric property, and to fix reasonable rates to be charged by the appellant for electric service. The company was directed to show cause why the original cost of its electric property less accrued depreciation should not be established as the electric rate base and why its books and accounts should not be adjusted to conform to the state commission's uniform system of accounts. The order further required the appellant to show cause why it should not be required to write out of its accounts any amounts which did not reflect actual value.

Concerning the matters covered by its order of November 10, 1943, the state commission held extensive hearings. Finally, on June 24, 1944, it entered an exhaustive and carefully considered order. It determined that it had jurisdiction to prescribe the manner in which the company should keep its corporate books, accounts and records, and that the books, records and accounts prescribed by it should be the official corporate accounts and records of the company.[5] The order of the state commission then proceeds to

[5] "This Department was created by Act No. 324 of the Acts of 1935, approved April 2, 1935. It is vested with power and jurisdiction to regulate all public utilities doing business in Arkansas with power to prescribe reasonable, uniform rates and practices. The Act expressly provides that the Department, upon its own motion, shall, upon reasonable notice after a hearing, 'find and fix just, reasonable and sufficient rates to be thereafter observed, and enforced and demanded by any public utility.' The Department is charged with the duty to 'ascertain and fix the value of the whole or any part of the property of any public utility.'

"Respondent is an Arkansas corporation and is engaged exclusively in intrastate business. The Department has jurisdiction to 'establish a uniform system of accounts' to be kept by Respondent and to 'prescribe the manner in which such accounts shall be

prescribe the method by which the company shall keep its accounts, and to establish its rate base on what is known in regulatory circles as the prudent investment standard. The prudent investment theory recognizes as the rate base the price paid as a result of arm's-length bargaining for property having actual value which is devoted to the public use, even though that price exceeds the original cost incurred by him who first dedicated the property to public service. The excess is required to be set up in a separate account but is considered as representing actual value and as being a part of the rate base, upon which the utility is entitled to earn a fair return.

Although the federal commission had before it the state commission's order of June 24, 1944, which had definitely claimed exclusive jurisdiction over the official accounting records and had prescribed a prudent investment rate base, neverthless it entered on September 27, 1944, a "Supplemental Order to Show Cause," the text of which is shown in the margin.[6]

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kept.' The Department, therefore, finds that it has jurisdiction to prescribe the manner in which the Respondent keeps its corporate books, accounts and records, and that the books, records and accounts so prescribed by this Department shall be the official corporate accounts and records of the Company. Its jurisdiction over Respondent and its electric and other operations is complete and comprehensive and the Department is the only regulatory authority having such all-inclusive jurisdiction.

"The Department is given power to supervise, regulate, restrict and control the issuance of stock, bonds, notes and other evidence of indebtedness by all public utilities doing business in Arkansas.

"The Act expressly provides that 'every public utility, and every person or corporation, shall obey and comply with each and every requirement of the Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in all matters herein specified, or any other matter in any way relating to or affecting the business of any public utility.'

"The foregoing powers of the Department were sustained by the Arkansas Supreme Court in Dept. of Public Utilities v. The Ark. La. Gas Co., 200 Ark. 983."

Excerpt from order of Department of Public Utilities of Arkansas, dated June 24, 1944.

[6] "It appearing to the Commission that:

"(a) On June 15, 1943, this Commission issued an order requiring Arkansas Power & Light Company ('Company') to show cause in writing, under oath, if any there be, why the Company should not be required to classify $16,610,196.85 in Account 107, Electric Plant Adjustments; $1,108,440.24, in Account 100.5, Electric Plant Acquisition Adjustments; $45,551,920.00 in Account 100.6, Electric Plant in Process of Reclassification; $2,293,567.58 in various Plant in Process of Reclassification Accounts within Account 108,Other Utility Plant; dispose of $2,402,515.42 in Account 107 in the manner described in paragraph (1) of the order of June 15, 1943; submit plans for the disposition of the remainder of $14,207,681.43 in Account 107 and of the $1,108,440.24 in Account 100.5, and prepare and submit to the Commission revised reclassification and original cost studies respecting the amount established in Account 100.6 and the various Plant in Process of Reclassification Accounts within Account 1008.

"(b) On September 18, 1943, the Company filed its response in which, in effect, it proposed to classify $7,791,086.11 of its electric plant at December 31, 1936, in Account 107 and $10,429,819.21 in Account 100.5 and Plant Acquisition Adjustments Accounts within Account 108.

"(c) Thereafter conferences were held between representatives of the Company, the staff of this Commission, and the staff of the Department of Public Utilities of Arkansas, but said conferences failed to produce complete agreement on the issues.

"(d) On January 13, 1944, the Commission set the issues raised by the order of June 15, 1943, and the Company's response thereto, for public hearing on February 16, 1944.

"(e) The hearing was postponed from time to time, in order not to interfere with a rate proceeding being conducted by the Arkansas Department of Public Utilities involving the rates of the Company, and on May 13, 1944, the Commission entered an order postponing the hearing 'pending further order of the Commission.'

"(f) The staff of the Commission in the meantime has been engaged in making further studies of the Company's response and of other data furnished the Staff by the Company, such other data being in the nature of an amendment to the Company's response which have not been formally filed with the Commission by the Company.

"(g) As a result of the additional studies, the staff of this Commission has submitted a supplemental report on the reclassification and original cost studies of electric

The company conceived this to be an assertion by the Federal Power Commission that it possesses authority under the law to require the company to make in its official records the adjustments recommended by the staff, adjustments which are seen to be drastic departures from the company's then existing accounting situation which had come into being through the compulsion of the order of the Arkansas commission. Alarmed at the prospect of being forced to disobey one of the two commissions and so to violate one of the two statutes whatever course it might take, the company compained to the court below that the two regulatory bodies, each proclaiming its paramount power to regulate, had placed it in a dangerous dilemma from which it could be rescued only by a judical determination concerning the contending claims of the two commissions.

The suit was filed in the District Court of the United States for the District of Columbia against Federal Power Commission and

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plant of the Company, which report is to be served herewith upon the Company and is made a part hereof by reference.

"(h) In the supplemental report the staff recommends that the Company be required to classify $11,881,199.23 in Account 107, Electric Plant Adjustments, and $9,293,057.46 in Account 108.15, Common Utility Plant Acquisition Adjustments, all as more fully set forth at pp. 4 to 16 of the supplemental report.[2]

"(i) The staff also recommends in the supplemental report that the Company be required to dispose of the $11,881,199.23 recommended for classification in Account 107 as follows:

"To Account 140, Unamortized Debt Discount and Expense, and Account 271, Earned Surplus, in appropriate amounts, representing unamortized debt discount and expense incurred in connection with the issuance as of October 1, 1926, of First and Refunding Bonds, 5% Series, due 1956, in the principal amount of $18,000,000	$1,497,546.00
"To Account 150, Capital Stock Discount, representing discount on capital stock	75,814.12
"To Account 151, Capital Stock Expenses, representing expenses associated with the issuance of capital stock	254,442.06
"To Account 146, Other Deferred Debits, and Account 271, Earned Surplus, in appropriate amounts, representing deferred franchise expenses erroneously capitalized as cost of plant	36,960.00
"To Account 250, Reserve for Depreciation of Electric Plant, representing unrecorded retirements	874,964.04
"To Account 271, Earned Surplus, or Account 270, Capital Surplus, if properly created for that purpose, representing write-ups and other erroneous charges in the Company's plant account	9,141,473.01
Total	11,881,199.23

"(j) In its supplemental report the staff recommends that the Company be required to submit a plan for the disposition of the $9,293,057.46, to be classified in Account 108.15.

"The Commission orders that:

"(A) At the public hearing to be held in the above-entitled matter, which hearing has been indefinitely postponed, the issues to be determined shall be those raised by the Commission's order of June 15, 1943, as supplemented by this order, and the Company's response to the order of June 15, 1943.

"(B) The Company shall file a response, under oath, within sixty days after the date of this order, to the recommendations contained in the supplemental report herewith to be served upon the Company, including a plan for disposition of amounts to the adjustment accounts. In such response the Company shall set forth any amounts disposed of since December 31, 1936, which are recommended for classification by the staff in Accounts 107 and 108.15 together with the manner in which such disposition was effected.

"(C) The Secretary serve upon the Company a copy of the supplemental report herein referred to concurrently with the service on the Company of this order."

"[2] Account 108.15, Common Utility Plant Acquisition Adjustments, a subaccount of Account 108, Other Utility Plant, is used for the purpose of identifying plant acquisition adjustments arising through acquisitions of properties of more than one utility department.

the Department of Public Utilities of Arkansas.[7] The complaint alleged that the company, which is a substantial electric utility in Arkansas, is a "public utility" in the meaning of the Arkansas statute regulating public utilities, and that, therefore, the state commission is exercising regulatory control over its accounting records and practices; that the state commission has ordered that the company's accounts shall be kept and treated in the manner prescribed by it, and that the accounts so kept and treated shall be the official corporate accounting records of the company.

It is further alleged in the complaint that, after the state commission had ordered changes in its accounting procedure and had established a new rate base and instituted new rates and the company had complied, the Federal Power Commission asserted that it alone possesses the sole, exclusive, and paramount jurisdiction and authority to regulate the official corporate accounting records and practices of the company. The federal commission's representatives made studies of the company's properties and books and thereafter recommended that the federal commission require dispositions of amounts in various accounts quite at variance with the treatment already given, and currently being given, those accounts pursuant to the mandate of the state commission. While the federal commission had not then conducted formal hearings on its staff's report, the complaint alleged that the company had been ordered to show cause why it should not make the adjustments recommended by the federal commission's employees, which adjustments would be violative of the order already entered by the state commission.

Being placed in such a dilemma, and faced with the prospect of incurring heavy penalties should it disobey one of the commissions, and so inevitably violate either the federal or the state statute, and finding it impossible to submit to the authority of both commissions since their claims were in hopeless conflict, the company turned to the Declaratory Judgment Act, presented its problem to the court, and asked to be told authoritatively which of the two commissions actually has, when the federal and state statutes are considered together, the legal right of regulatory control over its official accounts, a right which is necessarily exclusive.

The Arkansas commission came into court voluntarily, alleging that it has the exclusive duty and power of supervisory control over the company's official accounting procedure. It filed a cross-claim against the federal commission and prayed for a judicial declaration that the exclusive jurisdiction to regulate, supervise, and control the official records and accounts of the company is vested in the

[7] After the suit was filed, the official designation of Department of Public Utilities of Arkansas was changed to "Arkansas Public Service Commission." It will be referred to in this opinion as "state commission."

State of Arkansas and its public service commission, and not in the Federal Power Commission.

Thereupon the Federal Power Commission pleaded that it alone has the power claimed by the Arkansas body but that, because it has not finished the process of exercising that power upon which it has already embarked, the District Court cannot resolve the difficulty by deciding as a matter of law where the exclusive right of control lies. It will thus be seen that the statement of an irreconcilable dispute between the two jurisdictions set forth in the complaint was shown by the affirmative pleadings of the two commissions to be an actuality.

In these circumstances the question was, of course, whether a justiciable controversy appeared concerning which a declaratory judgment might properly be rendered. The District Court apparently regarded the complaint as an attempt to review a definitive order of the Federal Power Commission. The reasoning used by it in reaching the conclusion that it did not have jurisdiction over the subject matter of the complaint and cross-claim, and that therefore the motion to dismiss filed by the Federal Power Commission should be granted, is thus stated in its opinion:

"Sec. 313 (b) of the Federal Power Act, 16 U. S. C. A. 825, l, provides that any party to a proceeding under this Act, aggrieved by an order issued by the Commission in such proceeding, may obtain a review of such order in an appropriate Circuit Court of Appeals, by filing in such court a written petition praying that the order of the Commission be modified or set aside. This method of judicial review is exclusive. (Cases cited.) The Federal Declaratory Judgment Act, 28 U. S. C. A. 400, does not confer upon the court jurisdiction which it does not otherwise possess. (Cases cited.) This court therefore does not have jurisdiction over the subject matter of the complaint."

In support of this holding of the court below, the federal commission in its argument before us points out that the complaint shows it has made no appealable order—in fact, has made no order at all—concerning the appellant's accounts. It says the matters pending before it are merely recommendations of its staff of accountants, which, after hearings are held, it may or may not adopt. Hence it argues that, as its administrative process is as yet incomplete, recourse may not be had to any court by a utility which is dissatisfied with its staff's recommendations. The only remedy of one who considers himself aggrieved by the report of the federal commission's staff, it is said, is to wait until the federal commission has entered a final order, and then to appeal to a circuit court of

appeals, the only form of review permitted by the Federal Power Act.[8]

This argument is valid of course with reference to orders issued by the federal commission concerning the form of accounts to be kept, concerning accounting practices and procedure, and concerning the disposition of amounts in various numbered accounts, because such orders may be reviewed only in the way the statute permits. It must indeed be admitted to be a valid argument concerning any actual exercise by the federal commission of supervisory control over utility accounting books and records.

But the argument is not valid here, because it misses the actual point involved. It ignores the fact, which has been pointed out earlier in this opinion, that this case does not have to do with bookkeeping entries or accounting problems as such, and that the complaint in this case does not seek a judicial review of the manner in which the Federal Power Commission has exercised regulatory control over the company's accounting records.

It is plain, therefore, that the contention of the federal commission to the effect that only its final orders may be reviewed, and then only by the exclusive method of appeal provided by the statute, overlooks the real nature of the controversy as we view it. For, as said before, this appeal is not concerned with the propriety of an actual order of the federal commission concerning the classification or treatment of accounts; it involves only the purely legal problem of determining, after considering together the applicable state and federal statutes, whether the federal commission or the state commission has the exclusive right to control the official accounting records of the company. It is alleged that both commissions claim to have that exclusive right, so this case involves only the search for the proper lodgement of the power of control, and has nothing to do with the manner in which the right of control has been or may be exercised by either commission.

As we have pointed out heretofore, if the record shows both commissions to be claiming to have the sole power and authority of supervisory and regulatory control over the official accounting records and methods of the company, an actual controversy was presented; and it was the right and duty of the District Court to

[8] Title 16, § 825-l (b) U. S. C. A., is in part as follows:

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. * * *"

take cognizance of it for the purpose of construing the statutes of the two sovereignties, and then to say authoritatively which commission, under the harmonized statutes, has the regulatory power which both assert, and which only one can exercise.

It is pertinent, therefore, to ascertain whether the record disclosed such a controversy, that is to say, whether it shows that each commission is contending that its organic statute gives it exclusive authority over the company's accounts. It matters not that one of them has not yet entered a definitive order concerning the accounting records; it is enough if the commission which has not entered such an order contends that it has the right to do so, to the exclusion of the authority claimed by the other.

Examination of the pleadings reveals the fact that the federal commission does assert the right to dictate, prescribe and control the utility's official accounting records. We find the complaint stating that the state commission is authorized and empowered by law to require the appellant to keep official books of accounts according to its uniform system and its rules regulating accounting. It is averred in the complaint that the state commission has asserted and exercised that authority and power, and that the appellant has obeyed its orders in that regard. The complaint further alleges that in ordering the appellant to respond to the recommendations of its staff's report, and to show cause why it should not make the accounting adjustments proposed by the staff, the federal commission is manifesting its intention to order changes in the official accounts which are now in the form required by the state commission, and thus in effect is proposing to reject and overrule the state commission's order.

This would seem to be a very definite pleading of an actual controversy, in that it is charged that both commissions claim the power and authority to be the sole arbiter as to the official corporate books of accounts. But, in its argument, the federal commission characterizes the allegations of the complaint to the effect that it will prescribe, control and regulate the official accounting records as nothing more than the appellant's prophecy concerning its future action. It says these allegations, therefore, do not amount to facts well pleaded and are not admitted by the federal commission's motion to dismiss. There would be force in this argument were it not for the fact that the federal commission's motion to dismiss contains this language:

"No claim is stated upon which relief can be granted, since the Commission's accounting authority with respect to 'public utilities' including plaintiff, is not affected by any accounting requirements prescribed under State law."

We regard the quoted words as an affirmative assertion by the federal commission of a claim to the exclusive right to supervise,

regulate and control the appellant's official accounting records, in spite of the allegations in the complaint that the state law confers, and the state commission claims and has exercised, exclusive authority over such official records. It will be noted that the statement above quoted from the motion to dismiss is made by the federal commission itself, and not by its staff. It constitutes an authoritative, affirmative statement that the federal commission believes it has, and will exercise, plenary and exclusive regulatory power over the company's official records of its accounts and business.

In attempted avoidance of a declaratory judgment, the appellees in effect say it is impossible at this point for it to be known whether they will sustain the original cost recommendations in their staff's report; and so the argument is that no controversy or conflict between the commissions is disclosed by the complaint, but only a difference between the Arkansas commission and the staff of the federal agency. Although the complaint alleges the federal commission will impose its original cost theory on the company, that commission replies that the statement is a mere prediction; but without denying its claim of right to override the orders of the state commission. We regard the allegations in the complaint as something more than prophecy. They are based upon the well-known fact that the Federal Power Commission is recognized as being an exponent of the original cost theory of establishing a rate base. It has been so described by the Supreme Court.[9] The federal commission uniformly has construed its system of accounts to require that the excess of prudent investment over original cost be written off.[10]

Scarcely more than a month before the federal commission filed its motion to dismiss the complaint in this case, and in support of that motion argued that it might or might not sustain the theory of its staff which would require, *inter alia*, the sum of $6,947,058.92, by which prudent investment exceeds original cost to be charged off or amortized, it had written a lengthy opinion,[11] in which it considered the proper accounting treatment to be accorded a large sum which it had ordered The Montana Power Company to classify in Account 100.5. The Commission's opinion said:[12]

"The company contends that the cost of intangibles should remain on its books, unamortized and undiminished, indefinitely in the future. * * *

[9] Northwestern Electric Co. v. Federal Power Comm'n, 321 U. S. 119, 123.
[10] In the Matters of St. Croix Falls Minnesota Improvement Co. and St. Croix Falls Wisconsin Improvement Co., 43 PUR (NS) 1, 11; In the Matter of The California Oregon Power Co., 47 PUR (NS) 193, 195; In the Matter of The Montana Power Co., 57 PUR (NS) 193, 226.
[11] Re The Montana Power Company, Opinion No. 120, Feb. 13, 1945, 57 PUR (NS) 193.
[12] 57 PUR (NS) 226.

"Consistent with our action in similar cases heretofore decided, therefore, we reject respondent's contention that the amounts should be kept in the accounts indefinitely without diminution by amortization or otherwise. Considering all the facts in this case, amortization over a reasonable period of time seems proper. Accordingly we shall order the amount of $5,086,428.48, includible in Account 100.5, to be amortized. * * * This is in accordance with our determination in the Pacific Power and Light Company Case in which we were sustained by the circuit court."

In another decision, the federal commission had before it the question of what disposition should be made of amounts in Account 100.5.[13] It reiterated the statement made in the Pacific Power and Light case and another earlier case that the elimination of the amounts in Account 100.5 is mandatory under its system of accounts. The staff's report in this case reflects the policy consistently adhered to and recently reaffirmed by the Federal Power Commission.

There can be no doubt as to the position of the Federal Power Commission as to whether it claims authority superior to that of the state commission, as charged in the complaint. Not only is that position affirmatively stated in the appellees' motion to dismiss, as we have shown, but it is also unmistakably set forth in the brief filed with us by the federal commission. After quoting § 301 (a) of the Federal Power Act (49 Stat. 854, U. S. C. A. Title 16, § 825a), the appellees state that its language gives them comprehensive authority in the regulation of the accounting of public utilities. The appellees then add this significant statement:

"There is no basis in the Act for the contention that the federal authority in this regard is subordinated to or affected by such state accounting requirements. The Act also furnishes no basis for the attempted distinction between the 'primary, dominant and prin-

[13] In its opinion in Re The California Oregon Power Company, Opinion No. 87, 47 PUR (NS) 193, the Commission said:

"[1] In its revised original cost study COPCO established the amount of $828,684.97 in Account 100.5, Electric Plant Acquisition Adjustments. There is no dispute as to the origin or classification of this amount. It represents the excess of acquisition cost over original cost of operating units or systems purchased. The issue is whether such amount should be properly amortized or permitted to remain indefinitely in Account 100.5.[a]

"This problem was before us very recently in the St. Croix Case[b] and again in Re Pacific Power & Light Co.[c] In the case before us we adhere to the conclusions therein reached that:

" 'Except for fictitious or paper increments, which should be charged off at once (American Teleph. & Teleg. Co. v. United States [1936] 299 U. S. 232, 240, 81 L. ed 142, 16 PUR (NS) 225, 57 S. Ct. 170), provision in advance of retirement should be made. In fact, such provision is mandatory under our, and most, if not all, systems of accounts. In practice, tangible plant assets are generally depreciated, whereas intangible assets are amortized. Accordingly, amounts in Account 100.5 should either be charged off immediately or spread over a reasonable period of time, if proper public utility accounting practices are to prevail.' "

[a] Account 100.5 provides that the amounts recorded therein with respect to each property acquisition 'shall be depreciated, amortized, or otherwise disposed of, as the Commission may approve, or direct.'

[b] (1942) F. P. C. Opinions Nos. 72 and 72-A, 43 PUR (NS) 1, 11.

[c] (1942) F. P. C. Opinion No. 84, 46 PUR (NS) 131."

cipal books of accounting' referred to in the complaint and the accounts to be kept in compliance with the Commission's requirements."

Again we say that we do not have before us at this time the question to which the foregoing argument is addressed, but we reproduce the appellees' language because we regard it as a plain statement by the federal authorities that they claim the right to prescribe and regulate the primary, dominant and principal books of accounts, which are the official records.

In view of the nature of the report and recommendations made to the federal commission by its own representatives, in view of its consistent adherence to the original cost standard, in view of the unmistakable tenor of its order of September 27, 1944, and because of its affirmative pleading, and its argument here, it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission.

It must be concluded, therefore, that the record disclosed to the District Court an actual controversy, which involved conflicting interpretations of the two statutes, the state commission claiming under the Arkansas regulatory enactment the sole right to supervise and regulate the company's accounts, and the federal commission claiming under the Federal Power Act the same exclusive right.

The Declaratory Judgment Act of 1934, invoked by the appellant, is remedial in nature, and uniformly has been construed liberally. It can be applied only in a situation where an actual controversy exists, because the Constitution restricts the exercise of judicial power to cases and controversies. The word actual is one of emphasis rather than one of definition.[14] A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. In this case, which is clearly an adversary proceeding, a sharp controversy is described by the pleadings. It is justiciable, in that the dispute is not hypothetical or abstract. The controversy in the present case is quite definite and concrete, for it puts in bold relief a specific question, arising under statutes from two different jurisdictions which affect one situation; that is, which commission is entitled exclusively to control the company's accounts.

This controversy touches the legal relations of parties having adverse legal interests, just as the Supreme Court has said the controversy must do if it is to be held justiciable under the Declara-

[14] Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240.

tory Judgment Act.[15] This is so because the legal relations of the two commissions, which loudly assert adverse legal interests, are involved; and, more important still, this controversy touches the legal relations of the company with the two commissions. It has been further held that to be justiciable the controversy must be real and substantial, admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts. Nothing hypothetical appears here; on the contrary the dispute is real and substantial and admits of specific relief through a decree adjudicating the scope of the power of each commission under the factual situation disclosed. Under these principles governing the application of the Declaratory Judgment Act, in view of the nature of the controversy shown by the record, we have no doubt that the judicial function may be appropriately exercised.[16]

The proposition that the Declaratory Judgment Act does not enlarge the jurisdiction of the District Court, which is urged upon us by the appellees, is not applicable. For the basic power of the court certainly includes an interpretation of statutes such as is involved in the present situation, unless that authority is cut off by the method of review of Federal Power Commission orders afforded by the Power Act. It is our view that the fundamental jurisdiction of the District Court to decide a case such as this, which involves no review of a Commission order, is not affected by the exclusive appellate procedure of the Federal Power Act.

It is peculiarly appropriate to invoke the Declaratory Judgment Act when one is uncertain of his rights and may suffer disastrous consequences if he were forced to await the hostile move of an adversary. It is generally agreed by bench and bar that, in providing a remedy to one thus unfortunately situated because of uncertainty as to the nature of his rights, the enactment of the Declaratory Judgment Act was a progressive move, and that the statute is a useful piece of legislation, leading to an early determination of actual disputes, avoiding expensive multiplication of litigation, and making it unnecessary for him who is uncertain as to his legal status to gamble for stakes in the form of substantial penalties should his guess be wrong.

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[15] Aetna Life Insurance Co. v. Haworth, supra.

[16] "Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. Nashville, C. & St. L. Ry. Co. v. Wallace, supra, p. 263; Tutun v. United States, 270 U. S. 568, 576, 577; Fidelity National Bank v. Swope, 274 U. S. 123, 132; Old Colony Trust Co. v. Commissioner, supra, p. 725. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. Nashville, C. & St. L. Ry. Co. v. Wallace, supra, p. 264." Aetna Life Insurance Co. v. Haworth, supra, p. 241.

It seems to us, consequently, that the present case presents an unusually appropriate opportunity for the exercise of the judicial function in the manner contemplated by the Congress when it enacted the Declaratory Judgment statute. If the company were required to await the decision of the Federal Power Commission, which inevitably would be contrary to that of the state commission, and then to decide for itself the important legal question as to which commission under the two statutes involved is its real master, it would be faced with the dangerous possibility of making an erroneous interpretation of the two statutes and, because of it, of suffering pains and penalties which follow a violation of the law, which by that time the company already would have committed.

This conclusion is not in derogation of the exclusive method of review stipulated in the Federal Power Act, as we have already pointed out. As the federal commission has made no final order, there is nothing from which an appeal could be taken by the company under the statutory scheme of appeal.

It is argued that Arkansas, through its public service commission, could intervene in the proceeding before the Federal Power Commission and there exhaust its administrative remedy; and, if dissatisfied with the decision of the Federal Power Commission, appeal to a circuit court of appeals. Such a theory presumes that a sovereign state must appear before a federal administrative body in order to have determined the legal effect of one of its own statutes considered in connection with a related federal statute. This proposes a novel extension of federal administrative power. Even if it be said that the Federal Power Commission has the right to exercise the judicial function of interpreting its own organic act, it could hardly be added that that agency also possesses the exclusive right to interpret a statute of one of the States of the Union, and to decide the relation between that state legislation and its own Act.[17] This would be contrary to the purpose for which the Congress enacted the Federal Power Act, which was to supplement, not supersede, the regulatory power of the states.[18]

We do not regard as a valid argument against the power of the District Court to declare the rights of the parties, the assertion that the company could get, by appealing to a circuit court of appeals,

[17] In Macauley v. Waterman Steamship Corporation, decided by the Supreme Court March 25, 1946, it was held that the Tax Court, an administrative body charged by the Renegotiation Act with determining certain factual questions thereunder, may construe the Act by deciding whether it applies to a given situation. The appellees suggest, therefore, that they have the same right with respect to the Federal Power Act. This argument overlooks the fundamental fact that something more is at stake here than merely to gauge the sweep of the federal statute. For it is one thing for a federal administrative agency to rule as to the coverage of its own act when that act stands alone. It is quite another for the agency to decide whether its organic act overrides the statute of a different sovereignty which already has been applied by the state authorities to the situation which the agency desires to control by applying the federal act. That is a task for the courts. We do not understand the Macauley case as extending to a federal agency the unprecedented power of exercising such a clearly judicial function.

[18] Connecticut Light & Power Co. v. Federal Power Comm'n, 324 U. S. 515.

after the federal commission has passed on the question of its own and the state commission's jurisdiction, the judicial determination of the conflict between regulatory jurisdictions which it seeks in the present suit. Existence of another route to the same goal does not preclude a litigant from invoking the Declaratory Judgment Act.[19] And, as the District Court's exercise of jurisdiction in this case will not impinge upon the provision of the Federal Power Act concerning appeals, since that provision relates only to the review of final, definitive orders of the federal commission,[20] we see no reason to deny to the appellant and the two commissions the speedy, relatively inexpensive answer to a vexing problem which will be afforded by a declaratory judgment in this case.

We have noted the argument of the appellees to the effect that the Federal Power Act confers on the federal commission exclusive jurisdiction over the company's official books of accounts, regardless of the state law. Whether it does or not we are not called upon to say. As the District Court considered itself without jurisdiction over the subject matter and so dimissed the complaint and cross-claim, this appeal has to do only with the propriety of that action, and does not permit us to examine the merits of the case. In this connection we have not failed to observe that, after stating its conclusion that a cause of action on which relief could be granted was not pleaded, the District Court's opinion goes on to say:

"Finally, the substantive question raised by the plaintiffs and cross-claimants appears to have been settled adversely to their contention. Northwestern Electric Co. v. Federal Power Commission, 321 U. S. 119."

That this was not intended to be a decision on the merits we have no doubt, as the Court already had expressly disclaimed the right to make such a determination. Moreover, it is not to be supposed that the trial justice, had he so intended, would have dismissed

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[19] Rule 57, Federal Rules of Civil Procedure; Aetna Casualty and Surety Co. v. Yeatts, et al., 99 F. (2d) 665; Delno v. Market St. Ry. Co., 124 F. (2d) 965; Doehler Metal Furniture Co., Inc. v. Warren, 129 F. (2d) 43, 76 U. S. App. D. C. 60; State Mut. Life Assur. Co. of Worcester, Mass. v. Webster, et al., 148 F. (2d) 315; Moore's Federal Practice Under the New Federal Rules, v. 3, p. 3194; Borchard, Declaratory Judgments, 2d Ed., pp. 342–4, where it is said:

"Thus, a court should not by declaratory judgment ordinarily interfere with the jurisdiction of an administrative commission, especially where the statute is not ambiguous and where the jurisdiction of the commission depends on a jurisdictional fact, such as the weight of a truck, which the commission must in first instance determine. So, when the statute provides that an appeal from an administrative determination may be taken only in a certain way and to a certain court, such as appeal from the National Labor Relations Board to the Circuit Court of Appeals, it would have been wrong for another court, like a United States District Court, to interfere and entertain a suit for a declaration that the National Labor Relations Board had no jurisdiction over a particular case.

"But this is quite different from asserting that whenever there is an administrative method of relief it is necessarily exclusive. That will depend on the presumed intent of the legislature. If the question is one of law or of the jurisdiction of the commission, it may be judicial economy and wisdom to decide the issue by declaration before the administrative channel has been invoked or exhausted."

[20] Federal Power Comm'n v. Metropolitan Edison Co., 304 U. S. 375.

with a casual observation important questions of law which seem not to have been heretofore discussed by any court, with the exception of a brief mention by the Court of Appeals for the Fifth Circuit in Alabama Power Company v. Federal Power Commission.[21]

We think a justiciable issue was disclosed and that it was error to grant the motion to dismiss. The judgment appealed from is therefore reversed and the cause is remanded. The District Court should set aside its order dismissing the complaint, then deny the motion to dismiss and proceed to determine the controversy. While the state commission did not appeal from the order dismissing its cross-claim, probably the District Court on its own motion will set aside that order also.

Reversed.

MORRIS, District Judge sitting by designation, dissenting: I regret that I cannot agree with the majority. The Arkansas Power and Light Company admittedly is a "public utility" within the meaning of the Federal Power Act. It is also admittedly a "licensee" within the meaning of that Act.[1] The Federal Power Commission is given explicit power and jurisdiction to require every licensee and every public utility to make, keep and preserve such accounts as the Commission may by rules and regulations prescribe as necessary or appropriate for the purposes of the administration of the Act, and is specifically authorized to prescribe a system of accounts to be kept by licensees and public utilities.[2] It is expressly provided, however, "that nothing in this chapter shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State."[3]

The Power Company here has been required by the Department of Public Utilities of the State of Arkansas to make and keep certain accounts in accordance with the laws of that State and regulations pursuant thereto. The Federal Power Commission has directed the Power Company to show cause why certain of its accounts should not be made to conform with certain recommendations made by members of the Commission's staff, and fixed a hearing for that purpose. The recommendations are that the assets of the Power Company be shown at an "original cost" figure substantially less than the "prudent investment" or "fair value" figure which is required by the Department of Public Utilities of the State of Arkansas. In this situation, and before any hearing had

[21] 124 F. (2d) 602.

[1] Exhibit 8 to complaint, par. 3, sec. 2. "The respondent [Arkansas Power and Light Company] also owns and operates two hydroelectric projects licensed under the Federal Water Power Act of 1920."

[2] Sec. 301a, Federal Power Act, 16 U. S. C. A. 825 (a).

[3] Id.

been had before the Federal Power Commission, the Power Company filed this suit in the District Court against the Federal Power Commission and its members and the Department of Public Utilities of the State of Arkansas and its members, seeking injunctive relief against the Federal Power Commission and a declaratory judgment to the effect that the Federal Power Commission has no authority under the Federal Power Act to require the Power Company to make and keep the accounts here involved. In the event it be determined that the Federal Power Commission has such authority, then the complaint seeks a declaratory judgment that the action of the Department of Public Utilities of the State of Arkansas is void as being repugnant to the Commerce Clause of the Constitution of the United States. The District Court, upon motion, dismissed the complaint, holding that it was without jurisdiction in the premises. From this action the Power Company appealed. The Department of Public Utilities of the State of Arkansas, which had voluntarily appeared in the court below, did not appeal, but the Attorney General of the State of Arkansas appeared as amicus curiae, supporting the position of the Power Company.[4]

It is, of course, not disputed that statutory provision is made for the judicial review of any final action by the Power Commission.[5] It is insisted, however, that such statutory review is not adequate in the present situation in that the Power Company finds itself in a dilemma brought about by the contentions of the Arkansas Department and the Power Commission that each has exclusive control over the same accounts of the Power Company; that to obey one will result in penalties from the other, and furthermore that the Congress had no intention of giving such exclusive control to the Commission with respect to accounts of a public utility controlled by state authority. This is based upon the proviso in Section 301 (a) of the Federal Power Act, which has been mentioned, that public utilities shall not be relieved from keeping accounts required under authority of the laws of any State read

[4] Subsequent to the order of the District Court dismissing the complaint, the Department of Public Utilities of the State of Arkansas, the name of which has been changed to Arkansas Public Service Commission, and its members, and the State of Arkansas have intervened in the proceedings pending before the Federal Power Commission. Appendix, appellee's brief, pp. 40–41.

[5] Sec. 313, Federal Power Act, 16 U. S. C. A., 825-l (a). Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. * * * No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *

in connection with Section 201 (a) of that Act.[6] Stated somewhat differently, the contention is that the declaration of policy in 201 (a) to the effect that the federal regulation was to extend only to those matters which are not subject to regulation by the States extends to and controls the power given to the Power Commission to control accounts. It seems to me rather late in the day for this to be urged as the basis for a District Court taking jurisdiction in a case where there is admittedly statutory provision for an administrative hearing with judicial review. In the first place, it has been repeatedly held that the language employed in Section 201 (a), just mentioned, was intended as a limitation on the federal authority so that it would extend only to the generation, transmission and sale of electric energy, which was not subject to regulation by the State, and that such language was not intended to be a limitation upon the power of the Commission with respect to the corporate financial arrangements of the utilities engaged in such production and distribution. Such was held to be the law in Jersey Central Co. v. Power Commission, 319 U. S. 61, 74. In that case, the Court was concerned with Section 203 (a).[7]

In the opinion, however, it is stated:

"This conclusion finds strong support in the fact that not only Sec. 203 (a), here under discussion, but Secs. 204 (a), 208 and 301 (a) regulate matters obviously subject to state regulation. If the scope of the limitation was as broad as petitioners contend, none of these sections just referred to would be effective. Section 203 (a) would be a nullity as of course the disposition and acquisition of facilities, merger, consolidation or purchase of securities by their utilities may be regulated by the states. But this does not follow where a specific limitation is placed on the issue of securities by Sec. 204."[8] [Emphasis supplied.]

It has been held that Section 201 (a) does not qualify Section 301 (a) where the latter was directly involved. Northwestern Electric Co. v. Federal Power Commission (C. C. A. 9th), 125 F. (2d) 882, 885. It is of striking significance that, where the Congress intended to limit the powers of the Commission with respect

[6] 16 U. S. C. A. 824 (a). It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in sections 824–825r of this title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

[7] 16 U. S. C. A. 824b (a). No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. * * *

to corporate financial matters, which were controlled by state authority, it expressly made such limitation. Section 204 (f).[5]

It is insisted, however, that the character of the accounts involved here are such as constitute what the Power Company terms as their "primary, dominant and principal books of account," and which in the Court's opinion are variously denominated "dominant, principal, primary and basic accounts" and as "official corporate accounts." The postulate is that one authority, and only one, can control the keeping of such accounts, and that the exercise by one authority necessarily excludes the exercise of authority by the other. It is further asserted by the Power Company, and accepted in the Court's opinion, that the Power Commission here is seeking to exercise its authority to the exclusion of the right of the Arkansas Department to require accounts involving the same subject matter and to control those so required. In so far as the accounts here involved are concerned, I cannot agree with either of these conclusions. The Federal Power Act nowhere recognizers any category of accounts as "primary, dominant and principal books of account" or "dominant, principal, primary and basic accounts" or "official corporate accounts," nor does the Act expressly exempt such accounts from the authority of the Power Commission. It has been repeatedly determined that accounts of the character here involved of a "public utility" or "licensee" may be required and controlled by the Power Commission, and that notwithstanding accounts covering the same subject matter are required to be kept and controlled by a competent state authority on a different basis. In Northwestern Electric Co., et al. v. Federal Power Commission, 321 U. S. 119, the Supreme Court affirmed Northwestern Electric Co. v. Federal Power Commission, 134 F. (2d) 740, decided by the Circuit Court of Appeals for the Ninth Circuit, in which it was held that the Power Commission had the authority to require and control accounts respecting the valuation of assets on a basis of "original cost" notwithstanding the sanction by a state authority of a different valuation on a "prudent investment" basis. Mr. Justice Roberts, speaking for the Court, stated in the opinion:

"Nothing in the statute or the order prevents Northwestern keeping other accounts if it so desires which will give information with regard to estimated present appreciated value of its assets."

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[5] 16 U. S. C. A. 824c (a). No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. * * *

(f) The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

In Pacific Power and Light Company v. Federal Power Commission (C. C. A. 9th), 141 F. (2d) 602, respecting an order of the Power Commision fixing the valuation of the assets of the public utility there involved on an "original cost" basis, the Court pointed out that the order of the Power Commission does not prohibit the keeping of other accounts on a "present fair value" basis. In Louisville Gas & Electric Co. v. Federal Power Commission, 129 F. (2d) 126, 133, the Circuit Court of Appeals for the Sixth Circuit, dealing with a licensee, stated:

"Section 301 (a) of the 1935 Act provides that every licensee and public utility shall make, keep, and preserve for such periods such accounts, records of cost, accounting procedures, etc., as the Commission may, by rules and regulations, prescribe. Furthermore, the provision that nothing in the Act should relieve a public utility from keeping such accounts as are required by the laws of the state, impliedly, if not expressly, discloses a purpose that the Commission shall prescribe such accounting system, notwithstanding that the state has required a like or a different system of accounts."

The authority of the Commission to require and regulate such accounts is recognized in various other jurisdictions.[9] This Court expressly sanctioned the exercise of such authority over the accounts of a "licensee" in Alabama Power Co. v. Federal Power Commission, 75 U. S. App. D. C. 315, 320; 128 F. (2d) 280, 285, wherein it was stated:

"The language of the statute and the clearly stated powers and duties of the Commission leave no doubt that, while a division of authority between it and appropriate state agencies is contemplated, so far as concerns regulation, the Commission is vested with summary and unlimited powers over the accounts of its licensees to the extent necessary to insure proper performance of its duties. If the State, in the proper performance of its duties, wishes to require the keeping of a separate set of books no doubt it can do so. And if the Company wishes to keep a third set for its own purposes there seems to be nothing in the law to prevent it from doing so. But two things are certain: (1) The statute clearly contemplates that the Commission may require the licensee to establish and maintain accounts; (2) the licensee must allow the Commission to have access to all accounts which it does keep."

No case has been cited, nor have I been able to find one, which has held contrary to those supporting the authority and jurisdiction of

[9] Northern States Power Co. v. Federal Power Commission (C. C. A. 7th), 118 F. (2d) 141; Niagara Falls Power Co. v. Federal Power Commission (C. C. A. 2d), 137 F. (2d) 787; Pennsylvania Power & Light Co. v. Federal Power Commission (C. C. A. 3d), 139 F. (2d) 445; California Oregon Power Co. v. Federal Power Commission (C. C. A. 9th), 150 F. 2d) 25.

the Power Commission to require and control accounts of the character here involved. The Power Company leans most heavily on the decision of the Supreme Court in Connecticut Light and Power Co. v. Federal Power Commission, 324 U. S. 515, but in that case the question was whether or not the Connecticut Light and Power Company was a public utility within the meaning of the Federal Power Act, and, therefore, whether or not the Federal Power Commission had any authority or jurisdiction respecting any accounts of the Connecticut Company. It was there decided that this Court proceeded upon an erroneous interpretation of Section 201 [10] in affirming an order of the Power Commission which determined the Connecticut Company to be a public utility. It was, therefore, considered doubtful that the Power Commission had applied the correct law with the result that the judgment of this Court was reversed, and it was directed that the cause be remanded to the Federal Power Commission for determination of the jurisdictional facts in accordance with the law as stated in the Court's opinion. Certainly there is no support for the Power Company's position here to be found in the Connecticut Company case. The significant thing about the action in that case, in so far as it is relevant here, is that the Supreme Court considered it necessary and proper for the jurisdictional facts to be determined by the Federal Power Commission.

I do not share the view expressed by the Court that facts are alleged in the complaint which show that the Power Commission has done, or threatens to do, anything which interferes with the clear right of the Department of Public Utilities of the State of Arkansas to require the Power Company to establish and maintain accounts such as that Department requires, and to control such accounts so established. The conclusion that the Power Commission does so threaten is based upon certain language in the Power Commission's motion to dismiss the complaint:

"No claim is stated upon which relief can be granted, since the Commission's accounting authority with respect to "public utilities," including plaintiff, is not affected by any accounting requirements prescribed under state laws."

The construction I put upon this language is that the Power Commission is asserting what the numerous authorities have said it had the right to do, namely, to require the Power Company to keep such accounts entirely independent of and unaffected by any state requirements. I do not construe such language to be an assertion that the Power Company shall not keep accounts required of it by the state authority and in strict compliance with such state

[10] 16 U. S. C. A. 824.

regulation and control. Such assertion would be in clear violation of the plain language of the Act. Should the Power Commission take any action which would interfere with the authority of the State, or any of its agencies, respecting accounts or any proper regulation of the Power Company, I am confident that upon review in this Court the Power Commission would be stopped in such unlawful action before it became effective.

For the reasons I have stated, I am convinced that there is a full and adequate remedy, with statutory judicial review, which must be followed, and that recourse to the District Court cannot be had in lieu thereof. I can, therefore, see no reason why this case should not be disposed of upon the principle decided in the case of Myers, et al. v. Bethlehem Shipbuilding Corp., 303 U. S. 41. It has been urged that the Myers case could be distinguished from the instant case because of the explicit language in the National Labor Relations Act not found in the Federal Power Act. What lingering doubt that the Myers case had application to administrative agencies other than the National Labor Relations Board has certainly been dispelled by the recent case of Edward Macauley, et al. v. Waterman Steamship Corporation, No. 435, October Term, 1945, decided by the Supreme Court March 25, 1946. In that case there was much stronger basis than here for the contention that the District Court could take jurisdiction, because the contract which were sought to be renegotiated by the Maritime Commission were between the steamship corporation and the British Ministry of War Transport, and not in terms between the steamship corporation and the Maritime Commission. The state of the law is even clearer now that it was when this Court, in Miles Laboratories v. Federal Trade Commission, 78 U. S. App. D. C. 326, 328; 140 F. (2d) 683, 685, speaking through Chief Justice Groner, said:

"On no subject is the opinion of that Court [Supreme Court], as I view it, more definitely fixed than it is on the lack of power of the courts to inject themselves or be injected into proceedings which Congress has committed to the primary jurisdiction of administrative agencies."

In the view here expressed, I do not consider that the District Court had jurisdiction to out or interfere with the jurisdiction of the Federal Power Commission, and, therefore, I am of the opinion that its action in dismissing the complaint should be affirmed.

United States Court of Appeals for the District of Columbia

No. 9125. April Term, 1946

ARKANSAS POWER & LIGHT COMPANY, APPELLANT

v.

FEDERAL POWER COMMISSION, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Before CLARK and WILBUR K. MILLER, Associate Justices, and JAMES W. MORRIS, District Judge, sitting by designation

United States Court of Appeals for the District of Columbia. Filed June 28, 1946. Joseph W. Stewart, Clerk.

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to said District Court for further proceedings in conformity with the opinion of this Court.

Per Mr. JUSTICE WILBUR K. MILLER.

Dated June 28, 1946.

Dissenting opinion by James W. Morris, District Judge, sitting by designation.

In the United States Court of Appeals for the District of Columbia

No. 9125

ARKANSAS POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL., RESPONDENTS

United States Court of Appeals for the District of Columbia. Filed Sept. 3, 1946. Joseph W. Stewart, Clerk.

Designation of record

The Clerk will please prepare and certify a transcript of record on petition for a writ of certiorari to the Supreme Court of the

United States in the above-entitled case, including therein the following:

1. The Joint Appendix to the briefs of the parties in this case;
2. Minute entry of argument;
3. Opinion of this Court;
4. Judgment;
5. This designation;
6. Clerk's certificate.

The Clerk is also requested to send to the Clerk of the United States Supreme Court the original record now on file in his office, which will be returned to him when the case has been disposed of by the Supreme Court.

(S) J. Howard McGrath,
J. Howard McGrath,
Solicitor General of the United States.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 30th day of August 1946.

(S) Charles A. Horsky,
Charles A. Horsky,
Attorney for petitioner Arkansas Power & Light Company.

United States Court of Appeals for the District Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to —, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and of the proceedings of the said Court of Appeals as designated by counsel in the case of: Arkansas Power & Light Company, Appellant vs. Federal Power Commission et al., Appellees, No. 9125, April Term, 1946, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this ninth day of September A. D. 1946.

Joseph W. Stewart,
Clerk of the United States Court of Appeals for the District of Columbia.
By C. Preston Gainor,
Assistant Clerk.

In the Supreme Court of the United States

October Term, 1946

No. ——

FEDERAL POWER COMMISSION, ET AL., PETITIONERS

v.

ARKANSAS POWER & LIGHT COMPANY, RESPONDENT

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-captioned case that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining this case on the merits, the printed record shall consist of the following:

a. Joint Appendix to the briefs of the parties in this case.

b. The proceedings had before the United States Court of Appeals for the District of Columbia.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia to file with the Clerk of the Supreme Court the entire transcript of record in the Court of Appeals for the District of Columbia, and any of the parties hereto may refer in their briefs and argument to said transcript of record, including that part which has not been printed.

AUGUST 30, 1946.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General of the United States,
Attorney for petitioners Federal Power Commission, et al.

AUGUST 30, 1946.

Charles A. Horsky,
CHARLES A. HORSKY,
Attorney for respondent Arkansas Power & Light Company.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

No. 543, October Term, 1946

Order allowing certiorari

Filed October 28, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1947

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. —

FEDERAL POWER COMMISSION, ET AL., PETITIONERS,

v.

ARKANSAS POWER & LIGHT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Power Commission, Leland Olds, Claude L. Draper and Nelson Lee Smith as Commissioners of said Commission,[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on June 28, 1946, and suggests that the judgment of the court below should be reversed without further briefs or argument.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (R. 41–43)

[1] The complaint also named as defendants Basil Manly and John W. Scott as Commissioners. Mr. Manly and Mr. Scott have since resigned, and their successors have not been substituted as defendants.

is unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 48–69) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1946 (R. 70). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the Federal Power Commission has under consideration, in a proceeding pending before it, questions concerning the proper amounts to be recorded in the accounts of an admitted "licensee" and "public utility" in accordance with the Commission's Uniform System of Accounts, and has set a date for public hearing thereon; and where a state regulatory agency has, with respect to the same subject matter, entered an order prescribing the accounting entries to be made in the general corporate and fundamental books of account of such "licensee" and "public utility", may a United States district court determine, by declaratory judgment, whether the Federal Power Commission or the state agency has exclusive authority to fix the amounts to be recorded in such general corporate and fundamental books of account?

STATUTES INVOLVED

The relevant portions of the Federal Power Act are set forth in Appendix A, *infra*, pp. 20–26. The relevant portions of the Arkansas Utility Act (Act 324 of 1935) are set forth in Appendix B, *infra*, pp. 27–29.

STATEMENT

On January 24, 1945, the Arkansas Power & Light Company ("Company") filed a complaint in the District Court of the United States for the District of Columbia against the Federal Power Commission ("Commission"), its Commissioners, and the Department of Public Utilities of the State of Arkansas ("Arkansas Department")[2] and its Commissioners, seeking a declaratory judgment as to which commission had exclusive jurisdiction over the "primary, dominant and principal books of accounts" of the Company, and requesting that all further action in the proceeding then pending before the Commission be enjoined (R. 20–22).[3]

The facts alleged in the complaint and shown by the attached exhibits may be summarized as follows:

The Company is a "licensee" under the Federal Power Act, and a "public utility" both under that Act and the relevant Arkansas statute (R. 5, 7).[4] In compliance with Electric Plant Accounts Instruction 2–D of the Commission's Uniform System of Accounts Prescribed For Public Utilities and Licensees, and Order of May 11, 1937, with respect thereto, the Company, on June 3, 1940, filed with the Com-

[2] The Arkansas Department has been succeeded by the Arkansas Public Service Commission. Act 40 of the Acts of the General Assembly of Arkansas, approved February 12, 1945.

[3] The prayer for an injunction was not pressed in the district court and was expressly abandoned in the brief for the Company before the Court of Appeals.

[4] Section 1 of Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935, Appendix B, *infra*, p. 27.

mission a proposed reclassification of its accounts (R. 9, 26; Exhibit 6 to complaint, p. 1).[5] The Commission staff made a field examination and audit of this proposal and prepared a report which raised questions concerning the accounting entries proposed by the Company (R. 9, 26; Ex. 5). This report was served on the Company by order of June 15, 1943,[6] which directed the Company to show cause why it should not make the adjustments proposed by the staff and submit a revised reclassification of its accounts (R. 27; Ex. 6, p. 1). A response thereto was filed by the Company on September 18, 1943 (R. 27; Ex. 7, p. 1).

On November 10, 1943, the Arkansas Department initiated an accounting and rate proceeding and, after hearing, issued an order on June 24, 1944, fixing rates and, as an incident thereto, requiring the Company to reclassify the amounts in the plant accounts of its "primary, dominant and principal books and accounts" in accordance with the Arkansas Department's Uniform System of Accounts and the findings set forth in its order (R. 6; Ex. 2).[7]

To avoid interference with the Arkansas Department's rate investigation, the Commission deferred

[5] There are nine exhibits to the complaint. These exhibits are not printed but are part of the transcript of the record on file with this Court. Such exhibits will hereinafter be referred to as "Ex."

[6] 3 F. P. C. 1018. By this order the Commission instituted a proceeding against the Company, *In the Matter of Arkansas Power & Light Company*, Docket No. IT–5829.

[7] This order was affirmed by the Circuit Court of Pulaski County, Arkansas (R. 7; Ex. 3). No further review of that decision has been sought.

its own proceeding (R. 27; Ex. 7, p. 2). After the Department's order was issued, however, the Commission's staff, in a supplemental report, raised further questions concerning the Company's proposed reclassification of accounts (R. 9–10; Ex. 6), and the Commission, on September 27, 1944, served this supplemental report on the Company and required it to show cause why the proposed reclassification should not be adjusted to conform with the staff's supplemental recommendations (R. 10–11; Ex. 7).

The Company filed a response to this order and, on November 20, 1944, moved to dismiss the Commission's show cause orders on the grounds that "the primary, fundamental and dominant books of account kept by the * * * [Company] are subject to the jurisdiction and supervision of the Arkansas Department," and "this Commission cannot lawfully exercise the power asserted or attempted to be exercised pursuant to its said show cause order"; that such exercise "would result in an irreconcilable conflict between State and Federal regulatory agencies" and that the Company would incur a "heavy penalty for failure to observe and comply with the * * * order promulgated by the Arkansas Department." (R. 17; Ex. 8, pp. 8–13).

On January 2, 1945, the Commission, upon consideration of the Company's proposed reclassification, the staff's reports thereon, the Commission's prior orders, and the motion to dismiss, ordered that a hearing be held, beginning on February 20, 1945,

"respecting the matters involved and the issue arising out of the proceedings in this matter" (R. 17 27; Ex. 9).[8]

On January 24, 1945, before the date set fo hearing, the Company filed its complaint in th district court (R. 2). In this complaint, it allege that, as a result of the Commission proceeding, i would be required to make certain entries in it "primary, dominant and principal books of accounts and make prescribed dispositions of certain amount (R. 14–15), that such requirements were beyond th jurisdiction of the Commission (R. 11, 13–14), an in direct conflict with those of the Arkansas Depart ment (R. 15). It further alleged that it would no be able to comply with the requirements of bot commissions (R. 16); that the requirements of on or the other of the commissions were void (R. 13–14) that the Arkansas Department threatened to an would prosecute it under the state laws for any failur to observe and comply with the Department's orde (R. 15), and that, should the Commission's order b made final, the Company would be subject to th penalties of the Federal Power Act for non-compliance (R. 15). Therefore, the Company prayed for a injunction against the Commission and for a declara tory judgment that the Arkansas Department ha jurisdiction over the Company's "primary, dominan and principal books of accounts" to the exclusion o the Commission or that "in the event it should b

[8] By subsequent order, the hearing has been postpone indefinitely, pending further order of the Commission.

held that the Commission * * * (has) exclusive jurisdiction the action of the Department * * * (is) void and of no force and effect;" (R. 20–22).

The Department voluntarily appeared in the district court and filed an answer and cross-claim (R. 23). It denied that its order was void (R. 23–24), and, asserting that the Commission could not constitutionally be vested with such jurisdiction (R. 29–30), requested the court to declare that the Department had exclusive jurisdiction over the Company's official corporate records and accounts (R. 32–33).

The district court granted the Commission's motion to dismiss the complaint and cross-claim (R. 41). Relying on *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, the court held that the review provided by Section 313 (b) of the Federal Power Act was exclusive, that the Federal Declaratory Judgment Act did not confer upon the court jurisdiction which it did not otherwise possess, and that therefore the court was without jurisdiction over the subject matter of the complaint (R. 42–43). The court also pointed out that administrative remedies had not been exhausted (R. 43). On appeal taken by the Company,[9] the Court of Appeals,

[9] No appeal was taken by the Arkansas Department. The Attorney General of the State of Arkansas appeared, however, as *amicus curiae* in the Court of Appeals, as he had in the district court, in support of the Company's position. Subsequent to the district court's decision, both the State of Arkansas and the Arkansas Department intervened in the proceeding before the Commission. Order of Commission, dated September 27, 1945.

Judge Morris dissenting, reversed, and held that inasmuch as "the legal relations of the two commissions, which loudly assert adverse legal interest, are involved; and more important still, this controversy touches the legal relations of the company with the two commissions * * *," an "actual controversy" is presented and "the judicial function may be appropriately exercised" (R. 60–61). Accordingly, it ordered the district court to set aside its order dismissing the complaint and to proceed to determine the controversy (R. 63).

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that the district court has jurisdiction to entertain a suit for a declaratory judgment upon the facts alleged in the complaint.

2. In holding that the district court has the power, in the circumstances of this case, to determine by declaratory judgment whether the Commission or the Arkansas Department has exclusive jurisdiction over the Company's fundamental corporate books and accounts.

3. In holding that the allegations of the complaint present an "actual controversy" within the meaning of the Federal Declaratory Judgment Act.

4. In holding that the Company and the Arkansas Department or either of them is not required to exhaust administrative remedies before seeking judicial relief.

5. In failing to hold that the district court is without authority to interfere with or limit the scope of the Commission's jurisdiction and authority respecting the matters which are the subject to the pending proceeding before the Commission (*In the Matter of the Arkansas Power & Light Company*, Docket No. IT–5829).

6. In failing to hold that the sole right to judicial review accorded the Company and the Arkansas Department with respect to the matters complained of is the review provided by Section 313 (b) of the Federal Power Act.

7. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case, even more plainly than its recent decision in *Waterman Steamship Corp.* v. *Land*, 151 F. 2d 292, reversed *sub nom. Macauley* v. *Waterman Steamship Corp.*, No. 435, October Term, 1945, decided March 25, 1946, is "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51, and cases cited.

The opinion of the court below completely ignores this Court's decision in the *Myers* case (R. 48–63), and all but ignores the recent reversal by this Court of its decision in the *Waterman Steamship* case (R. 62, note 17). The decision of this Court in the latter

case makes it clear, *a fortiori*, that the decision of the Court of Appeals in the instant case should be reversed. The two cases are similar in that in the *Waterman Steamship* case, the administrative agency had summoned the plaintiff to a conference, whereas here the plaintiff has been called to a hearing. In the *Waterman Steamship* case, this Court required that administrative remedies be exhausted, even assuming that the Renegotiation Act there involved "specifically provides that the Tax Court's determination is not subject to court review; and that even if respondent could, subsequent to a Tax Court determination, have resort to the courts, it would be subjected to a multiplicity of suits in order to recover the money due on the contracts." No. 435, October Term, 1945, slip opinion, pp. 3–4. In the case at bar, it is perfectly clear that any final order that the Commission may ultimately issue will be subject to judicial review (Section 313 (b), Appendix A, *infra*, pp. 25–26), and there is no allegation, or possibility, that a multiplicity of suits would be necessary in order to have the order of the Commission set aside. Nevertheless, the court below has directed the district court to decide a question which is still pending before the commission. See *supra*, pp. 5–6, ~~note 3~~.

The decision below is, therefore, in direct conflict with applicable and controlling decisions of this Court.

2. The holding of the Court of Appeals, that the presence of the "actual controversy" which it found

existed [10] is sufficient to require the district court to take jurisdiction, ignores the principle that statutory provisions for appellate review of administrative action, such as Section 313 (b) of the Federal Power Act, are exclusive. See *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159; cf. *Securities and Exchange Commission* v. *Andrews*, 88 F. 2d 441 (C. C. A. 2); *Miles Laboratories, Inc.* v. *Federal Trade Commission*, 140 F. 2d 683, 684–685 (App. D. C.), certiorari denied, 322 U. S. 752; *Black River Valley Broadcasts* v. *McNinch*, 101 F. 2d 235, 237–238 (App. D. C.), certiorari denied, 307 U. S. 623; *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800, 804–805 (C. C. A. 3), certiorari denied, 316 U. S. 663.[11] While purporting to recognize the exclusiveness of the court review provided in Section 313 (b) (R. 56–61), the court below refused to apply that provision in the instant case on the basis of distinctions which we submit are invalid.

(a) The Court of Appeals based its refusal to apply the exclusive remedy rule on the gound that "As the federal commission has made no final order, there is nothing from which an appeal could be taken

[10] The lack of an "actual controversy" is pointed out, *infra*, pp. 15–17.

[11] The section of the Securities Exchange Act (15 U. S. C. 78y) relating to court review is precisely the same in regard to exclusiveness as Section 313 (b), Appendix A, *infra*, pp. 25–26; the corresponding section of the Federal Trade Commission Act (15 U. S. C. 45 (d)) is substantially the same; that in the Federal Communications Act (47 U. S. C. 402 (b), (c), and (e)) contains no such provision. These were the statutes involved in the *Andrews*, *Miles Laboratories*, and *Black River Valley Broadcasts* cases.

by the company under the statutory scheme of appeal." (R. 61.) Since there is never a final order when administrative remedies have not been exhausted, this theory would nullify the entire exhaustion doctrine. Implicit in the statement of the court below is the assumption that so long as no final order is involved the courts will undertake, even at preliminary stages, to resolve conflicts arising in administrative proceedings. This assumption is patently unsound since it is well established that interlocutory and procedural orders, issued with reference to questions raised at the preliminary stages of administrative proceedings, are at that time not ripe for judicial determination. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–385, and cases cited; *United States* v. *Los Angeles Railroad Co.*, 273 U. S. 299, 309. The court below treated the exhaustion requirement and the rule with respect to following the judicial review procedures provided by statute as wholly unrelated to each other when they are, in fact, complementary.

(b) Nor is there any validity to the view of the court below that resort to Section 313 (b) is excused where the issue in the case is not the propriety of "accounting practices" or "bookkeeping entries" but the "purely legal problem" of determining the right to control the accounting records of the company (R. 56–57). This is merely another way of saying that questions of coverage are exempted from the exhaustion requirement; but it was the Court of Appeals' adoption of this very theory that was

reversed in the *Waterman Steamship* case. And in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49–50, the statutory review procedure was held to be exclusive even though the issue in the case was solely one of coverage—of the constitutional power of the National Labor Relations Board over the Bethlehem Shipbuilding Corporation.

3. The court below refused to require an exhaustion of administrative remedies, holding that there was involved not merely the sweep of the Federal Power Act but a conflict between that Act and a "statute of one of the States of the Union," and that the requirement of exhaustion would force a sovereign State to "appear before a federal administrative body in order to have determined the legal effect of one of its own statutes considered in connection with a related federal statute" (R. 62).

In the first place, as we have seen, the Commission has issued no final order, and there is not as yet, and may never be, a conflict between the federal and state statutes as applied by the respective regulatory agencies. In the second place, it is the Commission's view that the State of Arkansas, through the Arkansas Department, may and should intervene in the proceedings before the Federal Power Commission, exhaust its administrative remedies, and, if dissatisfied with the decision of the Commission, appeal to a circuit court of appeals. It was plainly contemplated by the Federal Power Act that this would be the only procedure whereby States and their regulatory agencies might seek a resolution of any disagree-

ment with the Commission. Section 302 (b) of that Act requires the Commission, before prescribing certain accounting and record requirements, to "notify each *State commission* having jurisdiction with respect to any public utility involved," to give a "reasonable opportunity to each such commission to present its views", and to receive and consider such views; Section 308 (a) states that when holding hearings, the Commission "may admit as a party any interested *State, State commission*, municipality * * * "; Section 313 (a) provides that "Any person, *State*, municipality, or *State commission* aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, *State*, municipality, or *State commission* is a party may apply for a rehearing" (italics supplied); and Section 313 (b) continues: "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order * * * ." [12] This procedure has been utilized frequently by States and their regulatory commissions, which commonly appear before the Commission to present evidence and argument for its consideration (see, e. g., *First Iowa Hydro-Electric Cooperative* v. *Federal Power Com-*

[12] Section 306 also provides that "Any person, *State*, municipality, or *State commission* complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition * * * ." (italics supplied) The texts of the above cited sections of the Act appear in Appendix A, *infra*, pp. 23–26.

mission, No. 603, October Term, 1945, decided April 29, 1946), and, when "aggrieved" by the Commission's order, seek judicial review under Section 313 (b). See, e. g., *Department of Conservation of Louisiana* v. *Federal Power Commission*, 148 F. 2d 746 (C. C. A. 5), certiorari denied, 326 U. S. 717–718; *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. C. A. 7), certiorari denied, 325 U. S. 880. In fact, both the Arkansas Department and the State of Arkansas have intervened in the proceeding now pending before the Commission. See *supra*, p. 7, note 9.

Furthermore, the "Commission would have been justified in following its own interpretation of the Federal Power Act * * *" and in ordering the Company to conform to its requirements regardless of "any other laws of the State of * * * [Arkansas] which the Commission held to be inapplicable or to have been superseded by the Federal Power Act." Cf. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, *supra*, slip opinion, at pp. 5–6. Obviously then, the procedure urged by the Commission involves no "novel extension of federal administrative power" (R. 62).

4. The court below adopted the Company's allegation that the Commission's action, in setting a date for hearing on the recommendations of the Commission's staff, created a "patent and irreconcilable conflict" with the Arkansas Department's order of June 24, 1944, which asserted jurisdiction over the Company's "primary, dominant and prin-

cipal books of accounts," requiring that they be kept in accordance with the Arkansas Department's uniform system of accounts, and that certain entries be made (R. 3). This "conflict" was not "irreconcilable," since the Commission was not making demands on the Company in regard to its books and accounts, nor was the Company prohibited from complying with requirements of the Department by any order of the Commission. The service of the staff reports by the Commission's orders of June 15, 1943, and September 27, 1944, had the effect, under Section 301 (a) of the Act, Appendix A, *infra*, p. 22, of pointing out "every accounting entry questioned by the Commission" so as to place on the Company the "burden of proof to justify" the proposed entries. Thus the staff reports merely specified the issues to be heard and did not create a conflict with the Department's order; accordingly there was no "concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged." *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 241. Nor was there an actual or immediately threatened invasion of legal rights of either the Department or the Company, in the absence of which a "case or controversy" could not exist. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324–325; *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (App. D. C.), certiorari denied, 323 U. S. 774; cf. *Dalton Machine Co.* v. *Virginia*, 236 U. S. 699, 701.

Since the Commission had only questioned the Company's proposed accounting entries, the Company's allegations, adopted by the court (R. 57–58, 60), that the result of the Commission hearing was a foregone conclusion, were "not statements of fact at all but mere predictions." *National War Labor Board* v. *Montgomery Ward & Co., supra*, at 530. Thus, the conflict over jurisdiction is only hypothetical and may never become real, again clearly demonstrating the lack of a "case or controversy." *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419, 443; *Maryland Casualty Co.* v. *Pacific Co.*, 312 U. S. 270, 273; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461.

Futhermore, the Court's conclusion that the Company "would be faced with the dangerous possibility of making an erroneous interpretation of the two statutes and, because of it, of suffering pains and penalties which follow a violation of the law" (R. 61), is unwarranted. As already pointed out, there is no Commission order outstanding creating such a "dangerous possibility." Moreover, any such order when issued would be subject to stay by the Commission or the courts on proper showing pending judicial review under Section 313 (b). Section 313 (c), Appendix A, *infra*, p. 26.

5. We need hardly labor the serious consequences, with respect to all federal administrative agencies, of allowing the judgment of the court below, which uses the declaratory judgment procedure to undermine the rule requiring exhaustion of administrative reme-

dies, to stand unreversed.[13] The repercussions of the decision below on the Federal Power Commission, in particular, will be far reaching, whether viewed broadly, or limited to potential disagreements between federal and state authority; under this ruling a "public utility" or "licensee", admittedly subject to the Federal Power Act, may, in the preliminary stages of the administrative process, invoke the Federal Declaratory Judgment Act to challenge in the courts the scope of the Commission's powers. As pointed out by the National Association of Railroad and Utilities Commissioners,[14] to accord to

[13] The decision of the court below is unaffected by the Administrative Procedure Act (Pub. L. No. 404, 79th Cong., 2d Sess., c. 324, approved June 11, 1946). For one thing, the Act first became operative on September 11, 1946, and is not retroactive. Section 12. Secondly, Section 10 (b), entitled "Form and Venue of Action", which provides that "the form of proceeding for judicial review shall be any special statutory review proceeding * * * in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments * * *) in any court of competent jurisdiction," and Section 10 (c), limiting "reviewable acts" to "every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court * * *" are intended only to declare the existing law concerning judicial review of administrative proceedings. Sen. Rep. No. 752, 79th Cong., 1st Sess., Appendix B (Attorney General's Statement), pp. 43–44; 92 Cong. Rec. 5759. There is no "reviewable act" present in the instant case, and, in any event, provisions for court review, such as Section 313 (b), have been, and still are, adequate.

[14] Bulletin No. 110—1946 to Member Commissions, dated July 16, 1946.

utilities the right "to ask for a declaratory judgment in any case where a State Commission claims jurisdiction over any extension, or service, or over rates for any service, or with respect to any matter of regulation, to the exclusion of the FPC * * * will give rise to a very considerable volume of Declaratory Judgment Act litigation." Many such issues have been, and can continue to be, resolved or obviated in the normal course of administrative proceedings. Under the decision below, however, the district court would be substituted for the Commission as the tribunal for the trial of such issues, and thus delay, if not wholly nullify, effective regulation.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted. Moreover, the basic question in this case has very recently been before this Court and has been resolved contrary to the decision of the court below. Under the circumstances, we believe that it would be appropriate for this Court to reverse the judgment of the Court of Appeals without further briefs or argument.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

BRADFORD ROSS,
General Counsel, Federal Power Commission.

SEPTEMBER 1946.

APPENDIX A

The pertinent provisions of the Federal Power Act (49 Stat. 838, 16 U. S. C. 791, *et seq.*) are as follows:

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in

intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 208. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost

of all additions, betterments, extensions, and new construction.

SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

* * * * *

SEC. 302. (a) The Commission may, after hearing require licensees and public utilities to carry a proper and adequate depreciation

account in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may, from time to time, ascertain and determine, and by order fix, the proper and adequate rates of depreciation of the several classes of property of each licensee and public utility. Each licensee and public utility shall conform its depreciation accounts to the rates so ascertained, determined, and fixed. The licensees and public utilities subject to the jurisdiction of the Commission shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such licensee or public utility shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its juridiction, with respect to any public utility, the percentage rate of depreciation to be allowed, as to any class of property of such public utility, or the composite depreciation rate, for the purpose of determining rates or charges.

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation rates, shall notify each State commission having jurisdiction with respect to any public utility involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

SEC. 306. Any person, State, municipality,

or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

SEC. 308. (a) Hearings under this Act may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

* * * *

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The applica-

tion for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for

failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

APPENDIX B

The pertinent provisions of the Arkansas Utility Act (Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935) are as follows:

SEC. 1 (d). The term "public utility" when used in this Act, includes persons and corporations, or their lessees, trustees and receivers, now or hereafter owning or operating in this state, equipment or facilities for:

(1) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam or other agency for the production of light, heat or power to, or for, the public for compensation;

* * * * *

(3) The term "public utility" as used in this Act for rate making purposes only shall include persons and corporations, or their lessees, trustees and receivers producing, generating, transmitting, delivering or furnishing any of the foregoing services to any other person or corporation for resale or distribution to or for the public for compensation.

SEC. 2 (a). There is hereby created a department of the Arkansas Corporation Commission to be known as the "Department of Public Utilities." It shall consist of three members to be known as commissioners, one of whom shall be a lawyer. * * *

SEC. 8 (c). The Department is hereby empowered, after hearing and upon notice, to make, and from time to time, in like manner, alter or amend such reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and of the practice and procedure governing all investigations

by, and hearings and proceedings before
Department, as it may deem proper and
inconsistent with this Act.

SEC. 19. The Department, upon compla
or upon its own motion, shall, upon reasona
notice and after a hearing, have the power

(1) Find and fix just, reasonable,
sufficient rates to be thereafter observed,
enforced and demanded by any public utili

* * * * *

(4) Ascertain and fix the value of the wh
or any part of the property of any pub
utility, insofar as the same is material to
exercise of the jurisdiction of the Departme
and the Department may make revaluati
of the whole or any part of said proper
from time to time and ascertain the value
any new construction, extension, and ad
tions to, or retirements from, the property
every public utility.

(5) Require any or all public utilities
carry a proper and adequate depreciat
account in accordance with such rules, re
lations and forms of account as the Depa
ment may prescribe; ascertain and determi
and by order fix the proper and adequ
rates of depreciation of the several classes
property of each public utility. Each pub
utility shall conform its depreciation accou
to the rates so ascertained, determined a
fixed by the Department.

SEC. 22 (a). The Department, by ord
may establish uniform system of accounts
be kept by any public utility subject to
jurisdiction, or may classify said public ut
ties and establish a system of accounts
each class, and the Department may prescri
the manner in which such accounts shall
kept.

SEC. 61 (a). Every public utility, and eve

person, or corporation, shall obey and comply with each and every requirement of this Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in the matters herein specified, or any other matter in any way relating to or affecting the business of any public utility, and shall do everything necessary or proper in order to secure compliance with, and observance of, every such order, decision, direction, rules or regulation by all officers, agents, and employees of every public utility.

(b). Any person or corporation which violates any provision of this Act or fails to comply with every lawful order, decision, direction, rule or regulation made or prescribed by the Department, or any part or provision thereof, shall be deemed guilty of a misdemeanor and upon conviction, subject to a penalty of not less than $100 nor more than $1,000 for each such offense.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 543

FEDERAL POWER COMMISSION, ET AL., PETITIONERS

v.

ARKANSAS POWER & LIGHT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 41–43) is reported in 60 F. Supp. 907. The opinion of the United States Court of Appeals for the District of Columbia (R. 46–69), is reported in 156 F. 2d 821. The Federal Power Commission has issued no opinion and no final order.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1946 (R. 70). The petition for a writ of certiorari was filed on September

27, 1946, and granted on October 28, 1946. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Federal Power Commission has under consideration, in a proceeding pending before it, questions concerning the reclassification and adjustment of the accounts of an admitted "licensee" and "public utility" and concerning the scope of its powers in such a proceeding, and has set a date for public hearing thereon. A state regulatory agency has entered an order prescribing accounting entries to be made in the company's general corporate and fundamental books of account.

The question is whether a United States district court may determine by declaratory judgment, in advance of the Commission's hearing and before it can be known if that issue has even to be decided or what its precise posture will be, whether the Federal Power Commission or the state agency has exclusive authority to fix the amounts to be recorded in such general corporate and fundamental books of account.

STATUTES INVOLVED

The Federal Power Act (41 Stat. 1063, 49 Stat. 838, 16 U. S. C. 791, *et seq.*) is printed in a separate pamphlet filed with this brief. The relevant portions of the Arkansas Utility Act (Act 324 of

1935) are set forth in Appendix A, *infra*, pp. 49–51. The Declaratory Judgment Act is printed as Appendix B, *infra*, p. 52.

STATEMENT

The question comes before this Court on certiorari to review a judgment of the United States Court of Appeals for the District of Columbia which reversed a district court judgment dismissing the complaint for want of jurisdiction.

Administrative Proceedings. The respondent, Arkansas Power & Light Company, a subsidiary of the Electric Bond & Share Company system (Ex. 5, p. 4),[1] is a "licensee" (Ex. 8, Appendix C, *infra*, p. 70) under the Federal Power Act and a "public utility" (R. 5, 7) under both that Act (pamphlet copy, pp. 26–27) and the Arkansas Utility Act (Appendix A, *infra*, p. 49), and subject to the Federal Power Commission's Uniform System of Accounts (Ex. 4, pp. v., 1, 3, 5, 6). In compliance with Electric Plant Accounts Instruction 2–D of that system of accounts (Ex. 4, p. 38) and a general order by the Commission dated May 11, 1937, with respect thereto, the respondent on June 3, 1940, filed with the Federal Power Commission ("Commission") a proposed reclassification of its accounts (R. 9,

[1] There are nine exhibits to the complaint, referred to herein as "Ex. —." The complaint is printed, R. 2–22. Exs. 7, 8, and 9 to the complaint, and relevant portions of Ex. 2, are printed as Appendix C, *infra*, pp. 53–83; the other exhibits are not printed, but are part of the transcript of the record on file with this Court.

26; Ex. 6, p. 1). The Commission staff made a field examination and audit of this proposal and prepared a report which raised questions concerning some of the accounting entries proposed by the respondent (R. 9, 26; Ex. 5). This report was served on the respondent by a Commission order of June 15, 1943,[2] which directed respondent to show cause why it should not make the adjustments proposed by the staff and submit a revised reclassification of its accounts (R. 27; Ex. 6, p. 1). A response thereto was filed by the respondent (R. 27; Ex. 7, Appendix C, *infra*, p. 66).

Thereafter, the Department of Public Utilities of the State of Arkansas ("Department") initiated a rate and accounting proceeding against respondent and, after hearing, on June 24, 1944, issued an order fixing rates and requiring respondent to reclassify its accounts (R. 6; Ex. 2).[3]

To avoid interference with the Department's rate proceedings, the Commission deferred its own hearing (R. 27; Ex. 7. Appendix C, *infra*, p. 66). After the Department's proceeding was completed, the Commission's staff, which had con-

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[2] 3 F. P. C. 1018. By this order the Commission instituted a proceeding against respondent, *In the Matter of Arkansas Power & Light Company*, Docket No. IT-5829.

[3] That order was affirmed by the Circuit Court of Pulaski County, Arkansas (R. 7; Ex. 3). It does not appear that any question was raised as to any effect of the Federal Power Act, or of any requirements prescribed thereunder; or that any further review was sought of the decision of the Circuit Court of Pulaski County.

tinued its investigation, raised further questions in a supplemental report concerning the respondent's proposed reclassification of accounts (R. 9–10; Ex. 6), and the Commission, on September 27, 1944, served that supplemental report on the respondent and required it to show cause why the proposed reclassification should not be adjusted to conform to the staff's supplemental recommendations (R. 10–11; Ex. 7, Appendix C, *infra*, pp. 65–69).[4]

The respondent filed a response to this order

[4] The accounting matters of principal importance before both agencies relate to the classification and adjustment of "write-ups" in Account 107, Electric Plant Adjustments (Ex. 1, pp. 25–26; Ex. 4, p. 19) and other excesses over original cost in Account 100.5, Electric Plant Acquisition Adjustments (Ex. 1, p. 25; Ex. 4, p. 19) and Account 108.15, Common Utility Plant Acquisition Adjustments, a sub-account of Account 108, Other Utility Plant (See Ex. 7, Appendix C, *infra*, p. 67, n. 1; Ex. 4, p. 20). The classifications and adjustments ordered by the Department appear in its order of June 24, 1944 (Ex. 2, Appendix C, *infra*, pp. 55–57); the relevant proposals of the company questioned in the show cause orders of the Commission are referred to in Ex. 7, Appendix C, *infra*, pp. 65–68, paragraphs (a), (b), (h), (i), (j), and (B). The largest differences between the Department's order and the Commission's staff recommendations consist of excesses over original cost (according to the staff) which the Department's order classifies and permits to remain in Accounts 100.5 and 108 (*infra*, p. 55). The Commission's staff report questions whether some of those amounts should not be classified in Account 107 and some in Account 108.15, and the Commission requested submission of a plan for disposition of all amounts classified in those accounts.

having first on November 22, 1944, petitioned the Commission to dismiss the proceedings initiated by its show cause orders of June 15, 1943, and September 27, 1944 (Ex. 8, Appendix C, *infra*, pp. 69–81).[6] By that petition it alleged that the Department had reclassified respondent's accounts and directed the entries and adjustments to be made in respondent's accounts and that respondent had complied with those directions (*infra*, pp. 70–71). Respondent also alleged that the entries and adjustments recommended by the Commission's staff differed from those respondent had made under the directions of the Department (*infra*, pp. 73–76). It further alleged that there are statutory penalties for violation of the directions of the Department and that the "primary, fundamental and dominant books of account kept by the respondent are subject to the jurisdiction and supervision of the Arkansas Department * * * [and] therefore this Commission cannot lawfully exercise the power asserted or attempted to be exercised pursuant to its said show-cause orders" (Ex. 8, Appendix C, *infra*, pp. 77–78). It asked, *inter alia*, that the proceedings initiated by the show-cause orders be dismissed, and "that the issues and matters raised by this motion [i. e., petition] be set for an early hearing and for oral argument before the Commission en banc * * *" (*infra*, p. 80).

[6] The filing date is not shown, but appears on the original in the Commission's files.

On January 2, 1945, the Commission, finding it "appropriate to carry out the provisions of the Federal Power Act," ordered that a hearing be held, beginning on February 20, 1945, "respecting the matters involved and the issues arising out of the proceedings in this matter." The order recited what those proceedings had been, and expressly included respondent's petition to dismiss. (Ex. 9, Appendix C, *infra*, pp. 82–83.)[6]

District Court Proceedings.—Three weeks later, and before the date set for the hearing, respondent filed the instant complaint in the district court against the Commission, the Department, and the members of each in their official capacities (R. 2–22).[7] In this complaint respondent made substantially the same allegations it had in its petition to the Commission, adding that the Commission "failed to act upon said petition as requested," and by its orders setting a hearing "has assumed the jurisdiction and power to consider, determine, and decide all of the issues raised"

[6] An erroneous reference in the order of January 2, 1945, to a motion filed November 20, 1944, and withdrawn when the petition was filed on November 22, 1944, was corrected by an order of January 9, 1945, printed as Appendix D, *infra*, p. 84.

[7] The complaint named as defendants, among others, Basil Manly and John W. Scott, as Commissioners. They have since resigned, and their successors have not been substituted as defendants. The Arkansas Department, which was not a party on appeal, has been succeeded by the Arkansas Public Service Commission. Act 40, Acts of the General Assembly of Arkansas, approved February 12, 1945.

by its show cause orders (R. 17). The complaint prayed for an injunction against the Commission[*] and for a declaratory judgment that the Department had jurisdiction over the respondent's "primary, dominant and principal books of accounts" to the exclusion of the Commission or that "in the event it should be held that the Commission * * * [has] exclusive jurisdiction * * * [that] the action of the Department * * * [is] void and of no force and effect" (R. 20–22).

The Department voluntarily appeared in the district court and filed an answer and cross-claim (R. 23). It denied that its order was void (R. 23–24), and, asserting that the Commission could not constitutionally be vested with such jurisdiction (R. 29–30), requested the court to declare that the Department had exclusive jurisdiction over the respondent's official corporate records and accounts (R. 32–33).

The Commission moved to dismiss the complaint and the cross-claim on two grounds: first, that the court did not have jurisdiction over the subject matter; second, that no claim was stated upon which relief could be granted (R. 40–41). The motion

[*] The prayer for injunction has not been pressed by the company in the lower courts. The Commission's records show that its hearing was postponed by order of February 8, 1945, on respondent's petition, and thereafter from time to time until November 23, 1945, when it was postponed "to a date to be hereafter fixed by order of the Commission," and that no such order has been entered.

was granted by the district court. It held that Section 313 (b) of the Act (pamphlet copy, pp. 47–48) provides an exclusive method of judicial review and that the Federal Declaratory Judgment Act (Appendix B, *infra*, p. 52) does not confer upon the court jurisdiction which it does not otherwise possess (R. 42–43). The district court also pointed out that the administrative remedies had not been exhausted (R. 43). Finally it added that the substantive question raised in the complaint and the cross-complaint appeared to have been settled against the contentions of the complaint and the cross complaint (R. 43).

The Lower Court's Decision.—On appeal by respondent, the Court of Appeals (Judge Morris dissenting) reversed the dismissal, holding that the "complaint exhibited a justiciable controversy properly cognizable under the Declaratory Judgment Act" (R. 47). Basing its argument on the premise "that a public utility cannot keep more than one set of actual, official corporate accounts" (R. 48), "since any reasonable mind immediately perceives that actual transactions can be truly reflected by only one set of figures" (R. 49), the court concluded that there was an actual controversy: a conflict between the Department and the Commission "each commission * * * claiming, to the exclusion of the other, the power to dictate and supervise official books of accounts" (R. 49. See R. 55, 59.) Such a claim by the Department it found in the Department's order of June

24, 1944 (Ex. 2, Appendix C, *infra*, pp. 53–65), which according to the court, "had definitely claimed exclusive jurisdiction" (R. 51, 59). The claim by the Commission it found as follows (R. 59):

> In view of the nature of the report and recommendations made to the federal commission by its own representatives, in view of its consistent adherence to the original cost standard, in view of the unmistakable tenor of its [show cause] order * * *, and because of its affirmative pleading, and its argument here, it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission.

Accordingly the court held that "the District Court should set aside its order dismissing the complaint * * *."[9]

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[9] The opinion adds: "then deny the motion to dismiss and proceed to determine the controversy. While the state commission did not appeal from the order dismissing its cross-claim, probably the District Court on its own motion will set aside that order also" (R. 63).

Although the Department did not appeal, the Attorney General of the State of Arkansas appeared as *amicus curiae*, as he had in the district court, in support of the respondent's position. After the dismissal by the district court, both the Department and the State intervened in the proceedings before the Commission. See the Commission's orders of September 27, 1945.

In directing denial of the motion to dismiss (R. 63, 70) the court disregarded the presence of the second, alternative

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that the district court has jurisdiction to entertain a suit for a declaratory judgment upon the facts alleged in the complaint.

2. In holding that the district court has the power, in the circumstances of this case, to determine by declaratory judgment whether the Commission or the Department has exclusive jurisdiction over the respondent's fundamental corporate books and accounts.

3. In holding that the allegations of the complaint present an "actual controversy" within the meaning of the Federal Declaratory Judgment Act.

4. In holding that the respondent and the Department or either of them is not required to exhaust administrative remedies before seeking judicial relief.

5. In failing to hold that the district court is without authority to interfere with or limit the scope of the Commission's jurisdiction and authority respecting the matters which are the

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ground in the motion to dismiss, i. e., that "no claim is stated upon which relief can be granted" (R. 40), a ground of decision relied upon by the district court (R. 43) but which the Court of Appeals refused to take seriously (R. 62–63). If the court's decision on the jurisdictional question were to be affirmed by this Court, this direction should be corrected to permit the district court to reconsider the second ground.

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subject of the pending proceeding before the Commission.

6. In failing to hold that the sole right to judicial review accorded the respondent and the Department with respect to the matters complained of is the review provided by Section 313 (b) of the Federal Power Act.

7. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

The decision of the court below permitting respondent to obtain in advance of an administrative hearing a judicial determination of some of the issues upon which the administrative body must necessarily pass is contrary to the established doctrine that parties may not seek judicial relief before administrative remedies are exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, and *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, are in point and controlling. The exhaustion principle applies to prayers for declaratory relief as well as to suits for injunctions. It applies to questions of law as well as matters of administrative discretion—although it is to be noted that in the present case the decision of the Commission may rest upon testimony as to technical accounting matters as much as upon legal conclusions. The fact that

there is no final administrative order does not justify the failure to exhaust administrative remedies but on the contrary makes it even more clear that the instant suit is premature. Nor does the fact that the present dispute involves the interrelationship between Federal and State statutes warrant disregard of the exhaustion doctrine. In the first place, until the Federal Power Commission renders its decision, the nature and extent of such a conflict, if there be any, will not be known. Secondly, when Congress is exercising its paramount commerce power the procedure which it establishes is as binding upon the states as on private persons. See *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 29, 1946. The assumption of the court below that the Commission would assert exclusive jurisdiction in conflict with that of the State is both unfounded at this stage of the proceeding and not [illegible] for avoiding the exhaustion doctrine.

II

Inasmuch as the impact of the Commission's accounting authority is at the present time contingent, speculative, and conjectural, there is no actual controversy cognizable under the Declaratory Judgment Act. The Commission has not claimed any exclusive power over respond-

ent's accounts. At most it has merely asserted that it may prescribe accounting requirements irrespective of state law. Nor does the Arkansas statute nor the Department's order in this case contain any language of exclusion. Clearly in the present posture of the proceeding before the Commission any controversy between the two governmental agencies is hypothetical and conjectural and not ripe for judicial determination. The courts will be reluctant to anticipate a conflict between State and Federal governments in the absence of a clear controversy.

ARGUMENT

Introduction

Although this case, in our view, involves an elementary application of the doctrine of exhaustion of administrative remedies, a preliminary clarification of the issues seems advisable.

The respondent is a public utility subject to both the Federal Power Act and the Arkansas Utility Act. Section 301 (a) of the Federal Act (pamphlet copy, p. 37) authorizes the Federal Power Commission to prescribe a system of accounts and requires utilities to keep such accounts as the Commission may prescribe; it further provides

> that nothing in this Act shall relieve any public utility from keeping any accounts,

> memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State.

The Arkansas statute also requires a utility to keep accounts as prescribed by the State regulatory agency. Neither statute provides that if a utility keeps the prescribed accounts it may not also keep different accounts if another sovereign so orders.

The respondent and the court below speak of the "primary", "dominant", "principal", or "official" accounts (R. 21, 48–51), and assume that each statute applies to these; from this they conclude that the two statutes are mutually exclusive. Respondent alleges that the Federal accounting requirements may not constitutionally be applied to it under the Commerce Clause because most, though not all, of its business is intrastate (R. 9),[10] and that, in any event, if the State's accounting requirements are made exclusive by State law, the proviso in Section 301 (a) quoted above "withhold[s] from the Federal Commission" all power to require the maintenance of different records for federal purposes (Brief in Opposition, p. 14).

The Federal Commission has in other cases assumed that its authority over accounting can not be limited by state action, and this Court has held it correct as to this. *Northwestern Electric Co.* v.

[10] This contention is not referred to by the court below or in respondent's brief in opposition.

Feleral Power Commission, 321 U. S. 119.[11] But the Commission has not held that a utility complying with its orders may not also keep other accounts required by state laws. Although, in a case in which the state had approved the federal requirements, the Commission has stated that its orders relate to the fundamental corporate accounts,[12] it has not expressly passed upon the question in relation to conflicting state rules.

[11] In the *Northwestern* case the company, another subsidiary of the Electric Bond & Share system, had argued that "the law of the State of Washington shall control the fundamental corporate books of account of Northwestern" and not "the Federal Power Commission system of accounts." (Petitioner's Reply Brief, No. 195, October Term, 1943, p. 25.) In rejecting this contention this Court stated (321 U. S. at 125):

"• • • We are not here concerned with what the regulatory authorities of Oregon or Washington may or may not demand or permit. Whatever that action may be, it is subordinate to Congress' appropriate exercise of the commerce power. The Commission's order does not purport presently to affect or constrain action by the states within their fields."

[12] *In the Matter of Northern States Power Company*, F. P. C. Opinion No. 138, July 3, 1946, relied upon by respondent (Br. in Opp., p. 12), was a case in which the proposed accounting adjustments approved and directed by the Commission had been approved by the Public Service Commission of North Dakota, the only state commission involved, and hence no problem of conflict with state requirements could have been presented. In submitting its proposal the Company had incorporated a reservation which might indicate that it intended to retain the right to maintain its fundamental corporate accounts in a different manner in the future. The Commission opinion made clear that the entries effectuating compliance with its orders must be made on the company's fundamental books of account without reservation. Otherwise they would be mere scraps of paper.

The Commission's order to show cause brought before it for a hearing the substantive propriety and validity of the proposals of its staff as to respondent's accounts. Respondent's petition to set aside these orders (R. 17; Exhibit 8, Appendix C, *infra,* pp. 69–81), brought before the Commission respondent's contention that it lacked power over respondent's accounts for the reasons mentioned. Both the order and the petition have been set for hearing before the Commission (Exs. 7, 9, Appendix C, *infra,* pp. 65–69, 82–83), a hearing which has been postponed for almost two years. The issues thus set for consideration by the Commission included the following interdependent questions: (1) Whether the Commission should order any accounting reclassifications or adjustments, as recommended by the staff of the Commission, differing from those ordered by the Department; (2) Whether the Commission should order any such different reclassificaions and adjustments to be recorded on respondent's fundamental corporate accounts; (3) Whether, if disparate sets of entries are ordered by the Commission and the Department on respondent's fundamental corporate accounts, they can, in fact, both be so recorded; if not, whether the Commission's power to issue such an order is excluded, affected or constrained by the Department's order. These questions may largely depend for their answer upon accounting technicalities and upon a consideration of the

relation of the questions to the purposes of the accounting provisions of the Federal Power Act."

The court below confused the question as to the Commission's power to prescribe accounts irrespective of state law with the question of the exclusiveness of the accounting requirements to be imposed by the Commission. The excerpts from the Commission's motion to dismiss (R. 40, 56–57) and its supporting brief below, as well as the prior decisions of the Commission, its staff recommendations, and the "unmistakable tenor" of the Commission's supplementary show cause order, upon all of which the court relied (R. 59) to show that the Commission had already made up its mind, relate at most to the former question. The court also assumed, as self-evident, that there "can be * * * only one set of figures" (R. 48–49) to truly reflect a company's operations and financial condition—an assumption which wholly disregards the variety of purposes for which the "figures" are to be used. See Kripke, *Accountants' Financial Statements and Fact-Finding in the Law of Corporate Regulation*, 50 Yale L. J. 1180, 1197 *et seq.*

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[19] These include not only the facilitating of the administration of the dividend (Sec. 305 (a)), merger (Sec. 203), security issue (Sec. 204) and rate (Secs. 205, 206) provisions of the Act (pamphlet copy, pp. 29–34, 40) but also the accomplishment of the independent objective of regulation "by the informatory process" (cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 436–438) which loomed large in the legislative history of the Act (*infra*, p. 26, n. 20).

I

RESPONDENT WAS NOT ENTITLED TO A JUDICIAL DETERMINATION PRIOR TO THE EXHAUSTION OF ITS ADMINISTRATIVE REMEDIES

In this case, as in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, a party is seeking to obtain in advance of an administrative hearing a judicial determination of some of the issues upon which the administrative body must necessarily pass. The decision of the court below here, even more plainly than its recent decision in the *Waterman* case (151 F. 2d 292), reversed at the last Term, is "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[18] Under a statute such as that here involved the rule rests not only on the principle of "judicial administration," but upon the specific statutory scheme providing for an administrative determination of all matters in the first instance, prior to judicial review. The doctrine enunciated in the *Myers* case and strongly reaffirmed in the *Waterman* case clearly applies here and bars jurisdiction to render a declaratory judgment.

None of the arguments advanced by respondent or the court below justifies a refusal to follow

[18] *Myers* case, 303 U. S. at pp. 50–51.

the established doctrine and the *Myers* and *Waterman* cases.[14]

A. *The Exhaustion Principle Applies to Prayers for Declaratory Relief.*—Although respondent's complaint sought both an injunction and a declaratory judgment, the prayer for injunctive relief has not been pressed (*supra*, p. 8, n. 8). The opinion below, relying on Borchard, *Declaratory Judgments*, emphasizes the fact that the suit is one under the Declaratory Judgment Act (R. 60–62).

But the *Waterman* case also involved a prayer for declaratory relief; indeed the opinion of the Court of Appeals in that case also relied on Borchard (see 151 F. 2d at 298). This Court summarily rejected the contention that the exhaustion doctrine was not applicable to declaratory judgment cases, saying (327 U. S. at 545 n.): "The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299; *Coffman* v. *Breeze Corporation*, 323 U. S. 316; *Alabama State Federation of Labor* v.

[14] Before the decision of the court below in the *Waterman* case (151 F. 2d 292) had been reversed by this Court, respondent relied on that case for the proposition that "a determination of the existence or lack of jurisdiction of an administrative agency over a particular subject matter which depended solely upon the construction of a statute was fundamental and jurisdictional and that the solution of the issue is a judicial function and not an administrative one." Brief for Appellant in Court of Appeals, p. 22.

McAdory, 325 U. S. 450; *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494, 499." Clearly the considerations of policy upon which the exhaustion doctrine rests would be frustrated if this were not the case. It is to be noted that in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 46, and the companion case of *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 56, the plaintiffs were praying for declaratory relief as well as for injunctions. In an earlier case under the National Labor Relations Act (*Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 100 (C. C. A. 5), certiorari denied, 299 U. S. 559), it was specifically stated that a court may not, by declaration, "stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin".[15]

B. *The Nature of the Question Here Sought to be Presented is Insufficient to Make the Exhaustion Rule Inapplicable.*—The court below held the exhaustion rule inapplicable because the present case does not involve the propriety of "accounting practices" or "bookkeeping entries," but only the "purely legal problem" of determining who

[15] The *Bradley Lumber* case, together with *Petroleum Exploration Co.* v. *Public Service Commission*, 304 U. S. 209, 221–222, and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51–52 (both of which cite the *Bradley* case with approval), sufficiently answer the allegations in the complaint (R. 18, cf. R. 32) that the expense of the administrative proceeding justifies respondent in not exhausting its administrative remedy.

should have exclusive control of the accounting records of the respondent (R. 55).

The problem here presented is not a "purely legal problem." If the administrative proceedings are permitted to be completed, the assumed "conflict" between the Department and the Commission may never materialize. Not only should the appearance of the Department in the Commission proceedings (*supra*, p. 10, n. 9) aid in finding means of accomplishing the purposes of both agencies, but even if the Commission requires respondent to make accounting entries and adjustments differing from those ordered by the Department, as the court assumed it would, technical accounting testimony may show that the disparate entries required by the respective agencies can nevertheless both be recorded on respondent's fundamental corporate accounts (*supra*, pp. 17–18). Thus the present question may well prove academic.[16] Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 508–509.[17]

In any event, "legal problems" are not immune

[16] Insofar as the constitutional question of supersedure may be involved, there would be further reason for avoiding the question. *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470; cf. *Alma Motor Co.* v. *Timken Co.*, No. 11, this Term, decided December 9, 1946.

[17] It should be noted that in that case the district court had jurisdiction independently of any power to pass on the question of coverage. *A fortiorari*, that case excludes the exercise of jurisdiction in a court action brought solely to take over the determination of that question from the administrative agency.

from the requirement that administrative remedies be exhausted. In the *Waterman* case this Court characterized as a question of law the issue as to "whether the contracts in question are subject to the Act" (327 U. S. at 544), but nevertheless held in unqualified terms that the district court could not decide such a question of "coverage when the administrative agencies authorized to do so have not yet made their determination" (327 U. S. at 544). And in the *Myers* case this Court declared, citing many cases, that the exhaustion rule "has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter" (303 U. S. at 51). Respondent's argument that its accounts are not subject to the constitutional jurisdiction of the Commission under the Commerce Clause is identical with the contention of Bethlehem in the *Myers* case. Its other contentions do not present issues so different in nature as to make the principle of the *Myers* case inapplicable.

C. *The Absence of a Final Administrative Order Does Not Justify Failure to Exhaust Administrative Remedies.*—The court below thought that "the exclusive method of review stipulated in the Federal Power Act'" did not bar a declaratory judgment because the "federal commission has made no final order" and "there is nothing from which an appeal could be taken by the com-

pany under the statutory scheme of appeal" (R. 61). We submit that the absence of a final order does not justify judicial intervention at this time but the contrary.

In Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 375, this Court held that the judicial review provisions of the Federal Power Act applied only to final orders and prevented a removal to the courts of a question pending before the Commission at any time before the entry of a final order.[18] The Court's reasoning was that any other construction would afford "opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions [and] do violence to the manifest purpose of the provision." (304 U. S. at 383–384). The same considerations apply even more strongly against district court review of such orders, for the "constant delays" due to such review would be much greater. Cf. *Securities and Exchange Commission* v. *Andrews*, 88 F. 2d 441, 442 (C. C. A. 2).

Furthermore it should be obvious that, even apart from the scheme of the Federal Power Act, adoption of the theory of the court below would nullify the entire exhaustion doctrine, inasmuch as there is never a final order until the adminis-

[18] An interlocutory order is, of course, reviewable on review of the final order in the proceeding, *Aluminum Company of America* v. *Federal Power Commission*, 130 F. 2d 445, 452 (App. D. C.).

trative remedy has been exhausted. In the *Myers* and *Waterman* cases, for example, it could equally have been argued that since there was no final order—indeed, as here, not even a hearing—it was appropriate for the courts to disregard the exhaustion rule.[19]

D. *The Exhaustion Principle Applies When the Dispute is as to the Interrelation of Federal and State Statutes.*—The court below suggests (R. 61) that the exhaustion principle may not be applied when there is a dispute as to a "legal" question between state and federal sovereignties, that at least when resolution of such conflict may require the construction of a state statute a state may not be compelled to appear before a federal administrative agency.

As we have indicated (*supra*, pp. 17–18), whether

[19] Respondent argues that the *Myers* case is distinguishable because the National Labor Relations Act specifically gives the Labor Board exclusive jurisdiction over the subject of unfair labor practices. No such distinction can be made of the *Waterman* case. Although the Renegotiation Act has an explicit provision giving the Tax Court exclusive jurisdiction once prior proceedings have been concluded, there is no such express language as to the authority of the Chairman of the Maritime Commission and other departmental renegotiation boards. The *Waterman* case was brought before any of the earlier administrative steps had been completed, and the Court's decision held that a suit would not lie while a case was before the readjustment boards, as well as prior to a Tax Court decision. The clear implication of the Federal Power Act, like the Renegotiation Act, is that the administrative remedy shall be exclusive regardless of the absence of express language to that effect.

there is a conflict between the requirements of the state and federal agencies is one of the issues set for hearing before the Commission. Until the Federal Commission issues its final order, after the hearing, no one can say whether such a conflict exists, or if so how far it extends. And the Federal Commission will not be faced with the necessity of construing the Arkansas law unless it first holds, contrary to *Northwestern Electric Co.* v. *Federal Power Commission,* 321 U. S. 119, *supra,* pp. 15–16, that the proviso in Section 301 (a) of the Federal Act gives the states power to prevent the Federal Commission from prescribing accounting requirements inconsistent with state law.[20] Apart from this issue the state law is relevant only in relation to the question whether the accounting requirements of each of the two agencies apply exclusively and inconsistently to "fundamental corporate accounts". That question can be

[20] It is to be noted that the legislative history of the Act shows not only a general purpose to meet the need for a nationwide uniform accounting system (S. Rep. No. 621, 74th Cong., 1st Sess., pp. 17–18, 53; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7–8, 30–31; 79 Cong. Rec. 10574–10575; and House Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 2170–2171) disclosed by the Federal Trade Commission's report of its investigation of the public utility industry (House Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 178–179), but also shows the specific rejection in conference (H. Rep., No. 1903, 74th Cong., 1st Sess., pp. 63–64, 75) of a hastily adopted House amendment which would have done exactly what respondent now seeks, and which was opposed for that reason (79 Cong. Rec. 10574–10575).

avoided if the Commission can work out a practicable method of accommodating the demands of the two agencies.

In any event, when Congress is exercising its paramount commerce power, the procedure which it establishes is as binding upon the states as on private persons. Numerous cases under the Interstate Commerce Act attest the lack of novelty in having states submit themselves to federal administrative procedures before resorting to the courts, even on extremely important questions, including matters of constitutional law. E. g., *New York* v. *United States*, 257 U. S. 591, 600–601; *North Carolina* v. *United States*, 325 U. S. 507; *New York, et al.* v. *United States*, Nos. 343–345, this Term, pending on appeal.

The administrative procedures under the Power Act are regularly utilized by states, state commissions, and municipalities, as shown by the Commission's reported opinions, and by the court cases in which they have both opposed Commission orders (e. g., *Department of Conservation of Louisiana* v. *Federal Power Commission*, 148 F. 2d 746 (C. C. A. 5), certiorari denied, 326 U. S. 717; *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. C. A. 7), certiorari denied, 325 U. S. 880) and supported them (e. g., *Federal Power Commission, et al.* v. *Hope Natural Gas Company*, 320 U. S. 591; *Panhandle Eastern Pipe Line Company* v. *Fed-*

eral Power Commission, et al., 324 U. S. 635; *Colorado Interstate Gas Company* v. *Federal Power Commission, et al.*, 324 U. S. 581). Furthermore, the Federal Power Act contains numerous provisions showing that the system there established was intended to apply to the states. Included among those provisions are a grant of a right to any "State, municipality, or State commission," among others, to complain against any "licensee" or "public utility" (Section 306 [21]); a grant of authority for their admission as parties to proceedings (Section 308 (a)); a grant to them of a right to apply for the rehearing which is the prerequisite to judicial review (Section 313 (a)); and a grant of a right, as a "party" when aggrieved by an order of the Commission, to obtain judicial review (Section 313 (b)). In administering the Act, the Commission not only notifies the states of proceedings before it when required to do so by the Act (e. g., Sections 4 (e), 4 (f), 202 (a), 202 (b), 203 (a), 207, 302 (b)), but follows the general practice of notifying them in all types of proceedings (11 F. R. 177A-493, 177A-502, September 11, 1946, Secs. 02.39, 1.19 (b)).[22]

That the Commission may, if it thinks it neces-

[21] The text of the cited sections appears in the pamphlet copy of the Federal Power Act.

[22] Both the State of Arkansas and the Department formally intervened in the proceeding now pending before the Commission after the District Court's dismissal of the instant complaint (*supra*, 10, n. 9.).

sary, construe state laws to the extent of determining whether they are applicable or superseded is shown by this Court's recent decision in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 29, 1946. That case presented the question whether the Commission had properly dismissed an application for a license for a hydroelectric project because the applicant failed to show compliance with an Iowa statute—compliance which the State of Iowa contended was required by Section 9 (b) of the Federal Power Act. This Court reversed the affirmance of the Commission's order of dismissal, indicating that the Commission had erred in not considering and acting on its "own interpretation of the Federal Power Act and proceeding with the merits of the application without requiring the petitioner to submit evidence of its compliance with * * * laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act" (slip opinion, p. 6). Thus the Commission has been required to do precisely what the Court of Appeals in the instant case said could "hardly" be done, viz., "to interpret a statute of one of the States of the Union, and to decide the relation between that state legislation and its own Act" (R. 61).

E. *The Assumption of the Court Below that the Commission Would Assert Exclusive Jurisdiction in Conflict with that of the State is Both*

Unfounded and Irrelevant.—The court below held that the complaint "presents an unusually appropriate opportunity for the exercise of the judicial function" (R. 61), notwithstanding the fact that administrative proceedings for the determination of the issue had not been completed, because (R. 59):

> * * * it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission.

What has been said in our introductory statement (*supra*, pp. 14–19) is sufficient to show that the Commission has not indicated that it intends to assert exclusive jurisdiction conflicting with that of the State. See also pp. 33–40, *infra*.

Furthermore, even if the contrary were true, the court below would not be warranted in failing to require completion of the administrative process. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159; *Highland Farms Dairy Co.* v. *Agnew*, 300 U. S. 608.

In the *Gilchrist* case, the New York Interborough Rapid Transit Company had applied to the Transit Commission for an increase in subway fares. Before the Commission had officially acted upon the application, the company obtained

a federal court injunction against commission interference with the establishment of the proposed higher fares. In this Court the company maintained that "nothing remained to be done [by the commission] but the mere formality of evidencing by a formal order a decision already made" (279 U. S. at 186). The Court, although questioning the basis for that assumption (279 U. S. at 206), accepted it for the purpose of its decision, but nevertheless held that the respondent must first complete the prescribed administrative procedure (279 U. S. at 207–209):

> At most, prior to the original bill, the Commission's members had accepted the view that it lacked jurisdiction to permit a new rate * * *. The members of the Commission intended to take official action appropriate to the circumstances, and neither what they did nor what they intended to do gave any adequate cause for complaint * * *.
>
> Under the doctrine approved in *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 231, and *Henderson Water Company* v. *Corporation Commission,* 269 U. S. 278, the Interborough Company could not have resorted to a federal court without first applying to the Commission as prescribed by the statute. And having made such an application it could not defeat orderly action by alleging an intent to deny the relief sought.

In the *Highland Farms Dairy* case, the Court said (300 U. S. at 616–617):

> One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon* v. *Atlanta*, 242 U. S. 53, 56; *Smith* v. *Cahoon*, 283 U. S. 553, 562. He should apply and see what happens.

If, as the Federal Power Act provides in Section 313 (a), the filing of a petition for rehearing, after the administrative decision has been definitely, though tentatively, indicated, is a prerequisite to judicial review,[33] *a fortiorari* the Commission should be afforded the opportunity at least to hold its hearing in advance of any decision before the matter is taken to a court.[34]

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[33] *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 282, 287 (App. D. C.), certiorari denied, 305 U. S. 625. Cf. *Levers* v. *Anderson*, 326 U. S. 219, 222–223.

[34] *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, a state tax case, is not to the contrary. The question there was whether a proceeding to review an administrative determination of a tax in a district court which had jurisdiction to review such determinations, was invalidated by the fact it had been initiated before certain formalities of certification and notice of the determination had been completed, although the administrative decision on the controverted aspects of the case had been orally announced.

So also *Dodez* v. *United States*, No. 86, October Term, 1946, decided December 23, 1946, is not opposed. For there the remaining administrative steps which Dodez was held not required to exhaust were "purely formal steps to be taken by camp officials" offering no possibility that the draft registrant might be "rejected or released from the duty to

remain and perform the further duties imposed on him" (slip opinion, pp. 10–11).

For discussions of the *Schnader* and *Gilchrist* cases, see Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 Minn. L. R. 560, 572–573; Berger, *Exhaustion of Administrative Remedies*, 48 Yale L. J. 981, 990–991.

II

THERE IS NO "CASE OF ACTUAL CONTROVERSY" COGNIZABLE BY THE DISTRICT COURT UNDER THE DECLARATORY JUDGMENT ACT

The facts in this case also indicate that there is no "actual controversy" cognizable under the Declaratory Judgment Act. For until the administrative process has been completed, the impact of the Commission's accounting authority is obviously too contingent, speculative, and conjectural to present any justiciable issue.

The "actual controversy" which the complaint attempted to plead and which the court below held to be sufficient under a "liberal" construction of the Declaratory Judgment Act (R. 59), is this: that the Department and the Commission are both claiming an exclusive right to require classification and adjustment of "write-ups" and other excesses over original cost in respondent's capital accounts (*supra*, pp. 5–10). But no facts relied on by the court show that either the Commission or the Department has exercised any power which necessarily excludes, affects, or constrains actions by the other agency.

A. *The Facts Relied on Do Not Disclose Any Claim of Power by the Commission Which Necessarily Excludes, Affects, or Constrains Action by the Department.*

To support the conclusion that the Commission claimed and "fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission," the court below concededly did not rely upon well pleaded facts admitted by the motion to dismiss,[25] but upon the Commission's "consistent adherence to the original cost standard" in its prior decisions;[26] the "position" taken by the Commission's staff

[25] The court conceded that the allegations of the complaint alone were insufficient to state a controversy:
"But, in its argument, the federal commission characterizes the allegations of the complaint to the effect that it will prescribe, control and regulate the official accounting records as nothing more than the appellant's [here respondent's] prophecy concerning its future action. It says these allegations, therefore, do not amount to facts well pleaded and are not admitted by the federal commission's motion to dismiss. *There would be force in this argument* were it not for the fact that the federal commission's motion to dismiss contains this language: 'No claim is stated upon which relief can be granted, since the Commission's accounting authority with respect to 'public utilities' including plaintiff [respondent here], is not affected by any accounting requirements prescribed under State law.'" (R. 65. Emphasis supplied.)

[26] The Court of Appeals was not justified in concluding from past decisions what the Commission's action would be in the present instance, even if those decisions had been in point. See *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, 487–488.

in the reports served on respondent (Exs. 5, 6) and the "unmistakable tenor" of the Commission's order serving the supplementary staff report (Ex. 7, Appendix C, *infra*, pp. 65–69);[n] and statements made in the Commission's motion in the instant case to dismiss on the alternative ground of failure to state a cause of action (R. 40) and in its brief in support thereof[n] (R. 59; see R. 56–59).

None of these materials, even if properly noticed by the court, substantiates the postulate

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[n] By its "show cause" orders of June 15, 1943, and September 27, 1944, the Commission ordered the reports of its staff's examination of respondent's original cost and reclassification studies served on respondent, called for response to the recommendations contained in the staff reports, and set a public hearing on the issues raised (*supra*, pp. 4, 5, 7). In this manner the Commission "questioned" certain of the accounting entries proposed to be made by respondent in reclassifying its accounts in accordance with the Commission's Uniform System of Accounts (Ex. 4), and placed on respondent "the burden of proof to justify every accounting entry questioned." *Northwestern Electric Company* v. *Federal Power Commission*, 134 F. 2d 740, 743 (C. C. A. 9), affirmed, 321 U. S. 119; *Alabama Power Company* v. *Federal Power Commission*, 128 F. 2d 280, 295 (App. D. C.), certiorari denied, 317 U. S. 652. In view of the terms of Section 301 (a) of the Act (pamphlet copy, p. 37), there seems no warrant for attributing any untoward significance to any "tenor" of Exhibit 7.

[n] The court below erred in using statements made in the second ground of the Commission's motion to dismiss (R. 40-41) and the supporting brief, to turn the motion into a speaking demurrer in order to cure the failure of the complaint to plead an actual controversy. *Cohen* v. *United States*, 129 F. 2d 733, 735–736 (C. C. A. 8).

essential to the conclusion it reached, stated in the dissenting opinion of Judge Morris (R. 66) as follows: "that one authority, and only one, can control the keeping of such [fundamental corporate] accounts"; that the exercise of such control by one authority necessarily excludes its exercise by the other; and that the "Commission here is seeking to exercise its authority to the exclusion of the right of the Arkansas Department * * *." In none of the statements, decisions, or other actions referred to by the court to supplement the complaint has the Commission sought to exclude any exercise of authority by any state over the accounts, memoranda or records of any "public utility" subject to its jurisdiction; or ordered any such "public utility" not to comply with state accounting regulations; or indicated or held that any exercise of authority by it over the fundamental corporate accounts of a "public utility" either excluded, constrained or affected any exercise of authority by any state over the same company's accounts, memoranda, or records. See pp. 14–19, *supra*.

The court below cited *Northwestern Electric Company* v. *Federal Power Commission*, 321 U. S. 119, among the materials it relied on. But the Commission's order which was there under review was characterized by this Court, in the face of contentions similar to those here sought to be advanced (*supra*, p. 16, n. 11), as one which

"does not purport presently to affect or constrain action by the states within their fields" (321 U. S. at 125). Clearly the mere fact that the Commission's system of accounts is a "cost system of accounting" (i. e., one that requires electric plant accounts to be stated at original cost, and legitimate acquisition costs in excess of original cost to be recorded in a separate account, with "write-ups" segregated in another account for elimination),* as recognized by this Court in the *Northwestern* case (321 U. S. at 123), provides no logical basis for the conclusion that the Commis-

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* It is difficult to perceive the materiality of the court's characterization of the Commission as an "exponent of the original cost *theory of establishing a rate base*" (R. 57, emphasis supplied) as distinguished from "prudent investment." Certainly this Court's reference in the *Northwestern* case, 321 U. S. 119, 123, to the Commission's system of accounts as a "cost system of accounting" (not "original cost" but "cost", which would include "acquisition cost") in a case which was not a rate case and did not involve determination of a rate base, and where the only dispute was over a "write-up" and not over an excess of bona fide, arm's length "acquisition cost," over "original cost" (i. e., cost to the person first devoting to the public use) does not support the proposition for which the court uses it.

Furthermore, the Commission has never excluded legitimate acquisition cost (prudent investment) in excess of original cost from the rate base in any of its formal rate cases. The question has never arisen as an issue. For a discussion of the origins of the original cost theory of public utility regulation and the part played therein by state commissions, see Samuel Cahan, *Original Cost for Utility Accounting, Public Service Commission of State of New York*, 1939.

sion claims "sole and exclusive" jurisdiction (R. 59)."[30]

Thus also the Commission's decision *In the Matter of The Montana Power Company* (57 P. U. R. (N. S.) 193, 196, note 3; application for rehearing denied, 59 P. U. R. (N. S.) 58, 59–60), cited by the court below (R. 57, n. 10), shows that the Commission did not claim a "sole and exclusive" power, but quite the contrary. For the order the Commission there entered is the only one entered after a hearing in which the Commission has prescribed accounting entries differing from those approved or prescribed by a state commission. Its reasons for doing so are explained in its opinion.[31] Notwithstanding the disparity of the entries ordered by the two commissions, The Montana Power Company, which is also

[30] For a discussion of this classification of book values, see Kripke, *A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107*, 57 Harv. L. R. 433, and 693.

[31] On application for rehearing the Commission said (59 P. U. R. (N. S.) at 59–60):

"* * * In effect, the position of the Montana Commission is accepted by the petitions [or rehearing] as the proper standard of accounting treatment; virtually every departure by this Commission from that standard is assigned as error * * *. Congress, in conferring upon this Commission jurisdiction over the accounts of 'licensees' and 'public utilities' provided for their uniform treatment. While Congress provided that 'public utilities' should not thereby be relieved from compliance with lawful state accounting requirements, it rejected an amendment which would have created substantially the situation for which the company now contends."

a subsidiary of the Bond & Share system, never applied to the Federal Power Commission or to the courts for relief because of any alleged factual inability on its part to comply with the orders of both commissions."[22]

What the Commission consistently has said in its opinions, as in its motion to dismiss and supporting brief in this case, is that its power to regulate a "public utility's" accounts is not "affected by" or "subordinated to" state accounting requirements."[23] This leaves unanswered the technical accounting question whether it is factually possible for both federal and state agencies to regulate the fundamental corporate accounts if disparate entries are prescribed. The initial decision of such a question properly belongs to the administrative rather than the judicial stage. That question, among others, the Commission had

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[22] Petitions for review of the Commission's order were duly filed in the United States Court of Appeals for the District of Columbia, Nos. 9047, 9048, on June 23, 1945, but dismissed on petitioners' motions on January 29 and February 4, 1946.

[23] R. 56, 58; *Northwestern Electric Company*, 2 F. P. C. 327, 330, affirmed, 125 F. 2d 882, 885, 886 (C. C. A. 9); *Northwestern Electric Company* v. *Federal Power Commission*, *supra*, pp. 15–16; *The Montana Power Company*, *supra*, p. 38. Other Commission decisions cited by the court of appeals (R. 57–58) are completely silent on the relation of the accounting requirements prescribed by the Commission to those prescribed by the States. As to *Northern States Power Company*, F. P. C. Opinion No. 138, July 3, 1946, relied upon by respondent (Br. in Opp., p. 12), see p. 16, n. 12, *supra*.

set for hearing coupled with the further technical accounting question of how it can be accomplished. On this key question the lower court had no basis for anticipating what the Commission would decide and certainly no basis for any legal presumption that disparate accounting requirements cannot be complied with in the same fundamental corporate accounts.[34]

B. *The Facts Relied On Do Not Disclose Any Exercise of Power by the Department Which Excludes, Affects, or Constrains Action by the Commission.*—Although the court below refers to the order of the Department as one "which had definitely claimed exclusive jurisdiction over the official accounting records" (R. 51, cf. complaint, R. 16), this conclusion too, depends on the court's unwarranted factual assumption that there can be "only one set of figures" to truly reflect the company's operations, to show the real results of its operations, and to represent "its true financial condition" to stockholders, the public, prospective investors, or creditors (R. 49).[35]

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[34] See *State Farm Mutual Auto. Ins. Co.* v. *Duel*, 324 U. S. 154, 159–160, where this Court upheld disparate reserve account requirements imposed by separate states on a fire insurance company.

[35] We do not see how it can be said that one set of figures discloses the "true financial condition" to the public if two public regulatory agencies have unreconciled conceptions of that condition. Obviously the court's statement would not be true as to accounts kept for depreciation for income tax purposes, which, as is well known, differ from those used in selling bonds.

The Arkansas statute (Appendix A, *infra*, p. 49) does not purport to establish any exclusive system of accounts. Nor does the Department's order (Ex. 2, Apendix C, *infra* pp. 53–65) in this case directing the accounting entries, adjustments, and dispositions to be made, contain any language of exclusion. The Department's opinion (Ex. 2, Appendix C, *infra*, p. 54), contains the clause: "the Department is the only regulatory authority having such all-inclusive jurisdiction," but the jurisdiction referred to had expressly included jurisdiction over retail rates. The Commission having no jurisdiction over retail rates, the Department's statement may be accepted as referring to that and as expressing no opinion on the question of whether its accounting powers were "sole and exclusive," a question not discussed or shown to have been considered. See the portions quoted R. 50–51, note 5.

It is true that in its cross-claim (R. 29–33) (which was dismissed without being appealed) and brief *amicus* in the court below Arkansas has indicated its agreement with respondent's position that the Department's authority is exclusive. If this be treated as a conclusive manifestation of the Department's position, it indicates that the Department will attempt to exercise exclusive jurisdiction over a utility's "fundamental" accounts, but not that any statute or order, rule or regulation of the Department has,

as yet, implemented that position. In any event, a controversy must have more than one party, and until the Commission has reached a decision in this case, a declaration of the Department's views would not be sufficient to warrant declaratory relief.

C. *Any Differences Between the Commission and the Department Are Not Now Ripe For Judicial Consideration.*—The well pleaded facts alleged in the complaint and admitted by the motion to dismiss make it plain that there is no immediate and "irreconcilable" conflict between the Commission and the Department, since the Commission is not issuing any presently effective order to the respondent with respect to the reclassification or adjustment of its accounts or preventing it from complying with the Department's order of June 24, 1944 (Ex. 2, Appendix C, *infra,* pp. 53–65).

The hypothetical, conjectural and contingent nature of any prospective conflict is apparent from a consideration of the administrative steps taken. As already stated, the only orders issued by the Commission have been the "show cause" orders of June 15, 1943, and September 27, 1944, and the order of February 20, 1945, setting a hearing (*supra,* pp. 4, 5, 7), which had the effect, contemplated in Section 301 (a) of the Act, of questioning certain accounting entries proposed in respondent's reclassification and original cost studies, and of notifying respondent of its burden to

justify such entries (*supra*, p. 35, n. 27). They were, therefore, mere procedural orders or notices formulating the issues and not determining legal rights or duties. More important, the question of sole and exclusive jurisdiction was first raised by respondent's petition filed November 22, 1944, and was at an interlocutory stage, having been only set down for hearing with the other issues in the case (*supra*, p. 7).[36] There was, accordingly, no "concrete case admitting of an immediate and definite determination of the legal rights of the parties" and no sufficient basis for any decree which could be "of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts," as required for jurisdiction under the Federal Declaratory Judgment Act. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 241; *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 429.[37]

[36] See *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 385–386; *Aluminum Company of America* v. *Federal Power Commission*, 130 F. 2d 445, 449–450 (App. D. C.).

[37] In the court below the respondent relied on *Interstate Natural Gas Co.* v. *Louisiana Public Service Commission*, 33 F. Supp. 50, 34 F. Supp. 980 (E. D. La.), and *Kentucky Natural Gas Corp.* v. *Public Service Commission*, 28 F. Supp. 509 (E. D. Ky.), affirmed, 119 F. 2d 417 (C. C. A. 6). In the *Interstate* case, the administrative agency had held a hearing on the jurisdictional question and had issued its final order on that question (33 F. Supp. at 50); in the *Kentucky* case the briefs show that the Commission had issued its order determining the company to

The allegations, adopted by the court below (R. 57–58, 60), that the result of the Commission's hearing was a foregone conclusion, were "not statements of fact at all but mere predictions." *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528, 530 (App. D. C.), certiorari denied, 323 U. S. 774. The contingent nature of any conflict is shown by the factual considerations already pointed out (*supra*, pp. 33–40), which make pertinent the statement of Mr. Justice Brandeis, dissenting, in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 613:

> It is possible that if the Commission made an order, the order would be of such a character as not to affect seriously the interests which plaintiffs seek to protect. * * *

The quasi-legislative act of prescribing accounting requirements, moreover, has not been completed and will not be completed until the

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be a "public utility" under the statute. In each case the Commission's order was being reviewed in the manner contemplated by the relevant statutory provisions (Baldwin's Kentucky Rev. Stat., 1942, § 278.410; Louisiana Gen. Stat., 1932, § 7937). In neither case was the court's jurisdiction questioned and in neither does the court's opinion make any reference to the question of exhaustion of administrative remedies or primary exclusive jurisdiction. Neither opinion discusses any reasons for concluding that there was jurisdiction to render a declaratory judgment. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511; *New* v. *Oklahoma*, 195 U. S. 252, 256.

Commission has issued its final order at the conclusion of the present proceeding. Judicial relief should be postponed until the "final legislative action" has been taken. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 230.

There is here, at most, "a difference of opinion between the officials of the two governments," and even then, not on the critical question as to the mutually exclusive or non-exclusive nature of their respective powers, but on the reclassification and adjustments which should be required. Such a difference of opinion, even if it were on the critical questions, would not constitute a justiciable controversy in the constitutional sense at its present stage (*United States* v. *West Virginia,* 295 U. S. 463)[20] and the requirements of a "controversy" under the Declaratory Judgment Act are "no less strict." *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461. The predetermination of "the rights of different sovereignties, pregnant with future controversies, is

[20] The Court there said (295 U. S. at 473–474):
"At most, the bill states a difference of opinion between the officials of the two governments, whether the rivers are navigable and, consequently, whether there is power and authority in the federal government to control their navigation * * * and hence whether a license of the Federal Power Commission is prerequisite to its construction. There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. * * *"

beyond the judicial function." *United States* v. *Appalachian Electric Power Company,* 311 U. S. 377, 423. And there has been a particularly marked judicial reluctance, even on review of final commission orders challenged as invading the regulatory domain of the states, to anticipate a conflict in the absence of any Commission exercise of a sole and exclusive regulatory power.[29]

D. *There Is No Necessary Risk Of Substantial Pains Or Penalties.*—The opinion of the court below reiterates in varying terms the conclusion that if respondent were required to await a decision of the Commission, if that decision asserted exclusive power, and if respondent were "then to decide for itself the important legal question as to which commission under the two statutes involved is its real master, it would be faced with the dangerous possibility of making an erroneous interpretation of the two statutes and, because of it, of suffering pains and penalties which follow a violation of the law, which by that time the

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[29] Compare the company's brief with the opinion of this Court in the *Northwestern Electric Company* case, *supra*, p. 16, n. 11; petitioner's brief, p. 39, with opinion of the Circuit Court of Appeals for the Ninth Circuit, *Pacific Power & Light Company* v. *Federal Power Commission*, 141 F. 2d 602, No. 10386; petitioner's brief, p. 45, *et seq.*, with the opinion of the Circuit Court of Appeals for the Ninth Circuit, *California Oregon Power Company* v. *Federal Power Commission*, 150 F. 2d 25, No. 10429, certiorari denied, 326 U. S. 781; and see *Northern States Power Co.* v. *Federal Power Commission*, 118 F. 2d 141, 144 (C. C. A. 7).

company already would have committed." R. 61; cf. R. 53, 60.

This statement ignores the fact that in the event an order asserting exclusive power is entered by the Commission, the Federal Power Act affords respondent an opportunity to have that order reviewed by a circuit court of appeals, and the right to petition this Court for certiorari. Section 313 (b) (pamphlet copy, p. 47). In addition, Section 313 (c) of the Act permits the Commission or the reviewing court, on proper showing, to stay a commission order pending final decision. Denial of a declaratory judgment, then, does not mean that respondent has to determine for itself the legality of the Federal Power Commission's order.[40] Compare *Macauley* v. *Waterman Steamship Corporation*, 327 U. S. 540, 545, where the possibilities of penalties seem to have been clear, but declaratory relief was nevertheless refused.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment by the Court of Ap-

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[40] The availability of an administrative procedure, to which the respondent, the State of Arkansas, and the Department have, in fact, submitted the present question (*supra*, p. 10, n. 9), differentiates this case from *Texas* v. *Florida*, 306 U. S. 398, 409–410; cf. *Massachusetts* v. *Missouri*, 308 U. S. 1, 15–16.

peals should be reversed, with instructions to affirm the judgment of the district court.

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JANUARY 1947.

APPENDIX A

The pertinent provisions of the Arkansas Utility Act (Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935) are as follows:

SEC. 1 (d). The term "public utility" when used in this Act, includes persons and corporations, or their lessees, trustees and receivers, now or hereafter owning or operating in this state, equipment or facilities for:

(1) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam or other agency for the production of light, heat or power to, or for, the public for compensation;

* * * * *

(3) The term "public utility" as used in this Act for rate making purposes only shall include persons and corporations, or their lessees, trustees and receivers producing, generating, transmitting, delivering or furnishing any of the foregoing services to any other person or corporation for resale or distribution to or for the public for compensation.

SEC. 2. (a) There is hereby created a department of the Arkansas Corporation Commission to be known as the "Department of Public Utilities." It shall consist of three members to be known as commissioners, one of whom shall be a lawyer. * * *

missioners, one of whom shall be a lawyer.

SEC. 8 (c). The Department is hereby empowered, after hearing and upon notice, to make, and from time to time, in like

manner, alter or amend such reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and of the practice and procedure governing all investigations by, and hearings and proceedings before the Department, as it may deem proper and not inconsistent with this Act.

SEC. 19. The Department, upon complaint, or upon its own motion, shall, upon reasonable notice and after a hearing, have the power to:

(1) Find and fix just, reasonable, and sufficient rates to be thereafter observed, and enforced and demanded by any public utility.

* * * * *

(4) Ascertain and fix the value of the whole or any part of the property of any public utility, insofar as the same is material to the exercise of the jurisdiction of the Department, and the Department may make revaluations of the whole or any part of said property, from time to time and ascertain the value of any new construction, extension, and additions to, or retirements from, the property of every public utility.

(5) Require any or all public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the Department may prescribe; ascertain and determine and by order fix the proper and adequate rates of depreciation of the several classes of property of each public utility. Each public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed by the Department.

SEC. 22 (a). The Department, by order, may establish uniform system of accounts to be kept by any public utility subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and the Department may prescribe the manner in which such accounts shall be kept.

SEC. 61 (a). Every public utility, and every person, or corporation, shall obey and comply with each and every requirement of this Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in the matters herein specified, or any other matter in any way relating to or affecting the business of any public utility, and shall do everything necessary or proper in order to secure compliance with, and observance of, every such order, decision, direction, rules or regulation by all officers, agents, and employees of every public utility.

(b). Any person or corporation which violates any provision of this Act or fails to comply with every lawful order, decision, direction, rule or regulation made or prescribed by the Department, or any part or provision thereof, shall be deemed guilty of a misdemeanor and upon conviction, subject to a penalty of not less than $100 nor more than $1,000 for each such offense.

APPENDIX B

The provisions of the Federal Declaratory Judgment Act (Judicial Code, Sec. 274D, as added by the Act of June 14, 1934, 48 Stat. 955, and amended by the Act of August 30, 1935, Sec. 450 (a), 49 Stat. 1027; 28 U. S. C. 400) are as follows:

> Sec. 274D. (1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
>
> (2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.
>
> (3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

APPENDIX C

Relevant provisions of Exhibit 2 to the complaint are as follows:

State of Arkansas

DEPARTMENT OF PUBLIC UTILITIES

At a session of the Department of Public Utilities, held in its office, State Capitol, Little Rock, Arkansas, on this 24th day of June, 1944. Present: Marvin Hathcoat, Chairman; A. B. Hill, Joseph Morrison, Commissioners.

Docket No. 225

IN THE MATTER OF THE GENERAL INVESTIGATION ON MOTION OF THE DEPARTMENT OF THE ELECTRIC OPERATIONS OF THE ARKANSAS POWER & LIGHT COMPANY

* * * * *

JURISDICTION OF THIS DEPARTMENT

This Department was created by Act No. 324 of the Acts of 1935, approved April 2, 1935. It is vested with power and jurisdiction to regulate all public utilities doing business in Arkansas with power to prescribe reasonable, uniform rates and practices. The Act expressly provides that the Department, upon its own motion, shall, upon reasonable notice after a hearing, "find and fix just, reasonable and sufficient rates to be thereafter observed, and enforced and demanded by any public utility". The Department is charged with the duty to "ascertain and fix the value of

the whole or any part of the property of any public utility".

Respondent is an Arkansas corporation and is engaged exclusively in intrastate business. The Department has jurisdiction to "establish a uniform system of accounts" to be kept by Respondent and to "prescribe the manner in which such accounts shall be kept". The Department, therefore, finds that it has jurisdiction to prescribe the manner in which the Respondent keeps its corporate books, accounts and records, and that the books, records and accounts so prescribed by this Department shall be the official corporate accounts and records of the Company. Its jurisdiction over Respondent and its electric and other operations is complete and comprehensive and the Department is the only regulatory authority having such all-inclusive jurisdiction.

The Department is given power to supervise, regulate, restrict and control the issuance of stocks, bonds, notes and other evidence of indebtedness by all public utilities doing business in Arkansas.

The Act expressly provides that "every public utility, and every person or corporation, shall obey and comply with each and every requirement of the Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in all matters herein specified, or any other matter in any way relating to or affecting the business of any public utility".

The foregoing powers of the Department were sustained by the Arkansas Supreme Court in *Dept. of Public Utilities* vs. *The Ark. La. Gas Co.*, 200 Ark. 983.

* * * * *

It is therefore ordered:

I. ACCOUNTS AND ADJUSTMENTS

A. *Accounts.*

The accounts of Respondent shall be stated as of January 1, 1944, as follows:

1. Account 100—Electric Plant—shall be stated at	$54,357,699.67
2. Account 100.1—Electric Plant in Service—shall be stated at	45,259,363.27
3. Account 100.3—Construction Work in Progress—shall be stated at	405,426.54
4. Account 100.4—Electric Plant Held for Future Use—shall be stated at	143,817.58
5. Account 100.5—Electric Plant Acquisition Adjustments—shall be stated at	6,947,058.92
6. Account 100.6—Electric Plant in Process of Reclassification, representing total remaining net fees paid to affiliated construction and other companies of $857,016.03 and Blakely Dam lands of $745,017.33, shall be stated at	1,602,033.36
7. Account 107—Electric Plant Adjustments—shall be stated at	3,284,302.76
reflecting (a) $2,678,413.12 remaining excess of book cost over cost to Respondent or its affiliate, and (b) $605,889.64, reflecting unrecorded retirements of electric plant.	
8. Account 108—Other Utility Plant—shall be stated at	6,397,916.83
which, in turn, shall be subdivided as follows:	
a. Gas Plant	1,312,134.05
b. Street Railway & Motor Coach Plant	5,085,782.78
9. Account 110—Other Physical Property—shall be stated at	27,124.17
10. Account 150—Discount on Capital Stock—shall be stated at	75,814.12
11. Account 151—Capital Stock Expense—shall be stated at	254,442.06
12. Account 140—Unamortized Bond Discount and Expense—shall be stated at	1,190,346.42

13. The Respondent's Reserve for Depreciation or Retirement of Electric Plant, as of December 31, 1943, shall be segregated departmentally, as indicated below:

Electric Property	$5,154,627.22
Gas Property	132,169.11
Railway and Motor Coach	1,817,422.89

and shall remain segregated from such date henceforth, being increased by the amount of such credit as shall be placed therein by accruals or other credits and decreased by the retirement of property or other debits.

B. *Adjustments.*

Within 90 days from the date of this order, the Respondent shall have:

1. Disposed of amounts hereinabove ordered to be charged to Account 107, by charging to Account 250—Reserve for Depreciation or Retirement of Electric Plant—the amount reflecting unrecorded retirements above, of $605,889.64.

2. Eliminated the amount in Account 107 of $2,678,413.12, set forth above, and eliminated any remaining Unamortized Debt Discount and Expense applicable to previously retired bonds ($815,546.00 at December 31, 1943) by charges to Earned Surplus or Capital Surplus theretofore created for the purpose.

3. Reported to the Department the proportion of fees (herein required to be included in Account 100.6—Electric Plant in Process of Reclassification) includible in Account 100 and Account 108 and the proportion of profit to affiliates therein contained, which profit, if any, shall thereupon be included in Account 107, and, thereafter, amortized by monthly installments of not less than one percent (1%) of such profits, if any, beginning within the month next succeeding the month of approval of such report, by charges to Account 537, with concurrent credits to Account 107, until the balance in Account 107 is extinguished. That part of such fees not representing profit to affiliates shall, upon proper find-

ing and order of the Department, be transferred to Account 100 or Account 108.

4. Made full and complete disclosure of the history, facts, and circumstances attendant to the inclusion of the cost of Blakely Dam lands in Account 110 for further finding and order of the Department.

Upon compliance with subdivisions A and B of this Part I of this order, the Balance Sheet Accounts of the Respondent will properly reflect the accounts of the Respondent and shall be considered to have been approved by the Department.

C. *Amortization Account 100.5.*

The amount of $904,116.10, found by the Department to be included in Account 100.5 and attributable to increase in structural value of existing electric property, shall be amortized by Respondent in the same ratio and at the same time as the items of physical property to which it is attributable are depreciated.

II. Rate Base, Annual Return, and Rate Reduction

A. *Rate Base.*

The rate base applicable to the Electric Property of Respondent at January 1, 1944, was and is $47,996,290.00.

The rate base applicable to Electric Property of Respondent at any time in the future shall be a proportion of the capital liabilities and surplus of Respondent, determined from the sum of amounts in Accounts 200, 201, 202, 203, 204, 205,

210, 211, 212, 213, 240, 270, and 271, less the sum of amounts in Accounts 140, 150, 152, and 153, distributed as follows:

1. The Electric Plant proportion of the total property shall be determined in the following manner:

a. From the amount in Account 100 shall be deducted the amounts in Accounts 250, 251, and 252.

b. From the total in Accounts 108, 110, 111, 112, 113, and 114 shall be deducted the amount in Account 253.

c. The proportion of electric plant to total property shall be the percentage that the amount determined under item a. bears to the sum of the amounts determined under items a. and b.

2. The resulting proportion shall be the applicable proportion of total capital liabilities and surplus of the Respondent, which shall constitute the electric rate base.

B. *Annual Return.*

The fair annual return allowable on the rate base is six percentum (6%) thereof, and rates and charges shall be sufficient at all times to produce such return, after deducting all charges, taxes, and all reserves applicable to the operations of the Respondent.

C. *Rate Reduction.*

Within 60 days after the date hereof, Respondent shall file, for the approval of this Department, reduced and revised schedules of prices and terms, or rate schedules, for electric services, designed to reduce its gross electric operating revenues in the amount of $975,000 per annum.

Such schedules shall be effective as of October 1, 1944, except as otherwise directed by the Department.

III. Annual Depreciation and Maintenace

The annual allowance for maintenance and depreciation shall be $1,600,000.00 (which includes, and shall hereafter include, total net revenues from the steam heat operations which shall be segregated therefor), plus three percentum (3%) per annum of the net additions to depreciable electric property made after December 31, 1943. For the current year in which this computation is made, the net additions to depreciable electric property shall be the average net additions during that year and shall be calculated on the average basis of the total annual net additions made, equally throughout the year, and, therefore, shall be based on one-half the total net additions at the rate of three percentum (3%).

The term "depreciable electric property" as used herein shall have the meaning as indicated under the definition of "Depreciation" in the Uniform System of Accounts for electric utilities.

IV. Continuous Supervision of Respondent

The Department hereby makes effective the following provisions for the continuous supervision of Respondent's business, property, accounts, rates, services, revenues, and all other matters and things it is empowered by law to do, including the adoption of a sliding scale arrange-

ment for the control and disposition of future earnings, as follows:

A. *Definitions.*

To the extent they appear therein, the terms used in this order have the meaning and definition contained in the Uniform System of Accounts, prescribed for electric utilities in Arkansas in the Department's order dated the 18th day of November, 1942, in Docket 580, unless otherwise indicated.

Such additional accounts and amounts, etc., as are herein prescribed and not included therein, are hereby adopted and approved, effective with the effective date hereof.

1. Gross Electric Operating Revenue means the amounts properly includible in Account 501, *exclusive of the amounts includible in the subdivision of Account 501 hereinafter mentioned.*

2. Revenue Deductions means the sum of the amounts properly includible in Accounts 502 to 507, inclusive.

3. Net Electric Operating Revenue means the difference between Items 1 and 2 above.

4. Electric Rate Base means the applicable proportion of capital stock, debt, and surplus, computed by the method provided in Section II of this order. The rate base in any period shall be the average amount of the base at the beginning and ending of such period.

5. Base Allowable Return means 6% per annum on the rate base described in Item 4 above, plus any amounts includible in Account 535, represented by interest payments to consumers on deposits made to secure the payment of bills for electric service.

6. Excess Net Electric Revenues means the amount by which Item 3—Net Electric Operating Revenue—exceeds Item 5, Base Allowable Return.

7. Deficient Net Electric Revenues means the amount by which Item 5, Base Allowable Return, exceeds Item 3, Net Electric Operating Revenue.

8. Excess Net Electric Revenue Deferred Credit means a deferred credit account hereby created to which Item 6, Excess Net Electric Revenues, shall be credited, or Item 7, Deficient Net Electric Revenues, shall be debited, as appropriate.

9. Excess Net Electric Revenue Deferred Credit Fund means a special fund account hereby created to which cash equal in amount to the credits or debits to Item 8, Excess Electric Revenue Deferred Credit, shall be debited or credited, as appropriate.

B. *Administrative Procedure.*

1. On or before 31 days after June 30th and December 31st of each year, beginning in 1945, the Respondent shall furnish the Department, in the form to be prescribed by the Department, the Rate Base, Revenues, and Expenses, computed in accordance with this order, for the preceding six months' period and the preceding twelve months' period, ending June 30th and December 31st, respectively.

2. For the period up to two (2) years following the cessation of hostilities involving this country (the designation "cessation of hostilities involving this country" to be set at a later date by the Department for the purpose of this order), the Respondent shall accumulate "Excess Net Electric Revenues" in a fund (hereinbefore called

"Excess Net Electric Revenue Deferred Credit Fund" and to be referred to hereinafter as "fund" in this order), which fund shall be disposed of either in part or wholly during such period by returning all or any part of such fund to the Respondent or the electric customers of the Respondent at the discretion of the Department.

3. The "period" designated in paragraph two (2) above may be terminated or extended at the discretion of the Department, upon application by the Respondent or by the Department on its own motion after due notice and hearing.

4. If, at the expiration of the "period" designated above, there remains in the "fund" all or any part of the amount accumulated, such amount shall be distributed as follows:

a. The Respondent shall receive fifty per centum (50%) of the first one-third (⅓) of such "fund", and the electric customers of the Respondent shall be refunded fifty per centum (50%) of the first one-third (⅓) of such "fund". The electric customers' portion shall be refunded in such amounts, manner, and method as shall be prescribed by the Department at that time.

b. The Respondent shall receive twenty-five per centum (25%) of the remaining two-thirds (⅔) of such " fund ", and the electric customers shall be refunded seventy-five per centum (75%) of the remaining two-thirds (⅔) of such "fund". The electric customers' portion shall be refunded in such amounts, manner, and method as shall be prescribed by the Department at that time.

5. Revenues equivalent in amount to the balance in the "Excess Net Electric Revenue De-

ferred Credit" (hereinafter referred to as "deferred credit") shall be kept in a special cash account entitled "Excess Net Electric Revenue Deferred Credit Fund", and any earnings of such "fund" shall be credited to the "fund". Withdrawals from this special cash account, other than those arising from the debits to the "deferred credit" account referred to in paragraph six (6) below, shall be made only upon authorization of the Department.

6. Each month the Respondent shall credit or debit to the "deferred credit" account, as appropriate, any amounts by which the "Base Allowable Return" on that month's "Electric Rate Base" fails to equal or exceeds the sum of the month's Net Electric Operating Revenues, and any amounts includible in Account 535, as defined under "Base Allowable Return". Credits to such "deferred credit" account shall be debited to a subdivision of Electric Operating Revenue, Account 501, and debits to such "deferred credit" account shall be credited to such subdivision of Account 501.

7. If the report due not later than July 31st of each year following the expiration of the "period" mentioned above and indefinitely thereafter shows a balance in the "deferred credit" account exceeding five per centum (5%) of the gross electric revenue for the preceding twelve months' period, all or any portion of the "fund" shall be distributed as determined by the Department not later than December 31st of that year, as follows:

a. The Respondent shall receive fifty per centum (50%) of the first $250,000.00, and the electric

customers of the Respondent shall be refunded fifty per centum (50%) of the first $250,000.00. The customers' portion shall be refunded in such amounts, manner, and method as prescribed by the Department at that time.

b. The Respondent shall receive twenty-five per centum (25%) of the remaining amount designated by the Department to be distributed, and the electric customers of the Respondent shall be refunded seventy-five per centum (75%) of such amount. The customers' portion shall be refunded in such amounts, manner, and methods as shall be prescribed by the Department at that time.

8. Whenever the Excess Net Electric Revenue, for any two consecutive years, is in excess of 5% of the Gross Electric Operation Revenue for such period and after the previously prescribed post-war "period", the Department may require further reduction in electric service rate schedules, to be made applicable to future business.

9. If, during any consecutive three semi-annual periods, the Respondent fails to earn an amount for return equivalent to the Base Allowable Return as defined herein, the Respondent may, subject to the approval of this Department, increase rates and charges by an amount sufficient to produce an amount equal to the Base Allowable Return as defined herein.

V. Retention of Jurisdiction

The Department hereby retains jurisdiction over all matters and things of which this order is the subject, and to which it is directed, and of the Respondent herein.

VI. Effective Date of Order

This order shall be in full force and effect from and after May 10, 1944, except as herein otherwise expressly provided.

By Order of the Department
This 24 day of June, 1944.

[SEAL] Zella Passe,
Secretary.

Exhibit 7 to the complaint is as follows:

United States of America—Federal Power Commission

Before Commissioners: Basil Manly, Chairman; Claude L. Draper, Leland Olds and John W. Scott.

September 27, 1944.

Docket No. IT–5829

In the Matter of Arkansas Power & Light Company

SUPPLEMENTAL ORDER TO SHOW CAUSE

It appearing to the Commission that:

(a) On June 15, 1943, this Commission issued an order requiring Arkansas Power & Light Company ("Company") to show cause in writing, under oath, if any there be, why the Company should not be required to classify $16,610,196.85 in Account 107, Electric Plant Adjustments; $1,108,440.24 in Account 100.5, Electric Plant Acquisition Adjustments; $45,551,920.00 in Account 100.6, Electric Plant in Process of Reclassification; $2,293,567.58 in various Plant in Process of Reclassification Accounts within Account 108,

Other Utility Plant; dispose of $2,402,515.42 in Account 107 in the manner described in paragraph (1) of the order of June 15, 1943; submit plans for the disposition of the remainder of $14,207,681.43 in Account 107 and of the $1,108,440.24 in Account 100.5, and prepare and submit to the Commission revised reclassification and original cost studies respecting the amounts established in Account 100.6 and the various Plant in Process of Reclassification Accounts within Account 108.

(b) On September 18, 1943, the Company filed its response in which, in effect, it proposed to classify $7[illegible],086.11 of its electric plant at December 31, 1936, in Account 107 and $10,429,819.21 in Account 100.5 and Plant Acquisition Adjustments Accounts within Account 108.

(c) Thereafter conferences were held between representatives of the Company, the staff of this Commission, and the staff of the Department of Public Utilities of Arkansas, but said conferences failed to produce complete agreement on the issues.

(d) On January 13, 1944, the Commission set the issues raised by the order of June 15, 1943, and the Company's response thereto, for public hearing on February 16, 1944.

(e) The hearing was postponed from time to time, in order not to interfere with a rate proceeding being conducted by the Arkansas Department of Public Utilities involving the rates of the Company, and on May 13, 1944, the Commission entered an order postponing the hearing "pending further order of the Commission."

(f) The staff of the Commission in the mean-

time has been engaged in making further studies of the Company's response and of other data furnished the staff by the Company, such other data being in the nature of an amendment to the Company's response which have not been formally filed with the Commission by the Company.

(g) As a result of the additional studies, the staff of this Commission has submitted a supplemental report on the reclassification and original cost studies of electric plant of the Company, which report is to be served herewith upon the Company and is made a part hereof by reference.

(h) In the supplemental report the staff recommends that the Company be required to classify $11,881,199.23 in Account 107, Electric Plant Adjustments, and $9,293,057.46 in Account 108.15, Common Utility Plant Acquisition Adjustments, all as more fully set forth at pp. 4 to 16 of the supplemental report.[1]

(i) The staff also recommends in the supplemental report that the Company be required to dispose of the $11,881,199.23 recommended for classification in Account 107 as follows:

To Account 140, Unamortized Debt Discount and Expense, and Account 271, Earned Surplus, in appropriate amounts, representing unamortized debt discount and expense incurred in connection with the issuance as of October 1, 1926, of First and Refunding Bonds, 5% Series, due 1956, in the principal amount of $18,000,000	$1,497,546.00
To Account 150, Capital Stock Discount, representing discount on capital stock	75,814.12

[1] Account 108.15, Common Utility Plant Acquisition Adjustments, a sub-account of Account 108, Other Utility Plant, is used for the purpose of identifying plant acquisition adjustments arising through acquisitions of properties of more than one utility department.

To Account 151, Capital Stock Expense, representing expenses associated with the issuance of capital stock	$254,442.06
To Account 146, Other Deferred Debits, and Account 271, Earned Surplus, in appropriate amounts, representing deferred franchise expenses erroneously capitalized as cost of plant	36,960.00
To Account 250, Reserve for Depreciation of Electric Plant, representing unrecorded retirements	874,904.04
To Account 271, Earned Surplus, or Account 270, Capital Surplus, if properly created for that purpose, representing write-ups and other erroneous charges in the Company's plant account	9,141,473.01
Total	$11,881,199.23

(j) In its supplemental report the staff recommends that the Company be required to submit a plan for the disposition of the $9,293,057.46, to be classified in Account 108.15.

The Commission *orders* that:

(A) At the public hearing to be held in the above-entitled matter, which hearing has been indefinitely postponed, the issues to be determined shall be those raised by the Commission's order of June 15, 1943, as supplemented by this order, and the Company's response to the order of June 15, 1943.

(B) The Company shall file a response, under oath, within sixty days after the date of this order, to the recommendations contained in the supplemental report herewith to be served upon the Company, including a plan for disposition of amounts in the adjustment accounts. In such response the Company shall set forth any amounts disposed of since December 31, 1936, which are recommended for classification by the staff in Accounts 107 and 108.15 together with the manner in which such disposition was effected.

(C) The Secretary serve upon the Company a copy of the supplemental report herein referred

to concurrently with the service on the Company of this order.

By the Commission.

LEON M. FUQUAY,
Secretary.

Exhibit 8 to the complaint is as follows:

UNITED STATES OF AMERICA—FEDERAL POWER COMMISSION

Docket No. IT-5829

IN THE MATTER OF ARKANSAS POWER & LIGHT COMPANY

PETITION

Comes the Arkansas Power & Light Company, the respondent, and for its petition herein states:

1. The respondent is a corporation organized and doing business in, and under the laws of, the State of Arkansas. It now owns and operates facilities for the generation, transmission and distribution of electric energy; operates steam heat and natural gas distribution properties and owns, and leases to an operating subsidiary, street railway and motor bus transportation properties. It formerly owned and operated ice and water properties. All of the respondent's property, business and operations are now, and since its organization have been, located and carried on exclusively in the State of Arkansas.

2. The respondent is a public utility within the terms and provisions of Section 1 of Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935. With the exceptions

hereinafter stated, all of the property and facilities of the respondent, its business transactions, activities, records and books of account, under the provisions of said Act 324, are exclusively subject to regulation and supervision by the Department of Public Utilities created and empowered by said Act 324. Said Department, since organization, has been actively as well as officially supervising and regulating the respondent.

3. The respondent is also a public utility within the meaning of Section 201 (e) of the Federal Power Act, approved August 26, 1935, and a definite and limited portion of respondent's electric facilities and properties, as provided in said Act and only to the extent so provided, are thereby subjected to the jurisdiction and powers of this Commission. The respondent also owns and operates two hydroelectric projects licensed under the Federal Water Power Act of 1920.

4. The Arkansas Department of Public Utilities, among other authority and powers, is specifically authorized and empowered to promulgate, and require the respondent and other utilities operating in the State to keep their books of account in accordance with, and to observe, a uniform system of accounts, as well as rules regulating accounting. Said Department has promulgated and adopted such a system of accounts, a copy of which is attached hereto as Exhibit A and made a part hereof to the same extent as if copied herein in full.

5. By order dated June 24, 1944, the Department has made a complete reclassification of respondent's plant account and has separately found and fixed the original cost of its electric,

gas, steam heat and transportation properties, the respective acquisition costs thereof and the excess of recorded over actual cost to the respondent or affiliated interests, and has directed the respondent to record in the proper and applicable accounts such amounts as would reflect the Department's findings, and has further directed the disposition of the several amounts required to be disposed of by the respondent. The entire and complete action of the said Department will more fully appear from a copy of its findings and order attached hereto as Exhibit B and made a part hereof to the same extent as if copied herein in full.

6. The respondent has complied with all the terms, conditions and provisions of said order of the Department with respect to its accounts and has recorded upon its books all of the entries thereby required to be made.

7. In aid of its limited and restricted jurisdiction over the facilities and transactions of the respondent and other electric public utilities, this Commission adopted a uniform system of accounts, a copy of which is on file with the Commission and is by reference attached hereto as Exhibit C and made a part hereof to the same extent as if copied herein in full.

8. The Arkansas System of Accounts now followed and observed by the respondent is substantially, if not exactly, the same as the system of accounts adopted by the Commission with reference to accounts, the numbers thereof, and directions as to debits and credits thereto.

9. This Commission directed the respondent to make and file a reclassification of its plant account

as of January 1, 1937. On June 3, 1940, the respondent filed such a report, a copy of which report is on file with the Commission and is by reference attached hereto as Exhibit D and made a part hereof to the same extent as if copied herein in full. Thereafter, the staff of the Commission made an audit and examination of the books, records and files of the respondent for the purpose of determining the accuracy of said report and filed what will be hereinafter designated as the original staff report, which report is on file with the Commission and is by reference attached hereto as Exhibit E and made a part hereof to the same extent as if copied herein in full. In this report the staff took exceptions to numerous amounts and items as classified by the respondent's report and also made recommendations as to the proper classification to be made of respondent's plant account and as to the several accounts to which various amounts should be debited and credited upon the books of the respondent.

10. Thereafter, this Commission issued an order in this matter requiring the respondent to show cause why the recommendations contained in said original staff report should not be confirmed and approved by the Commission. Said show cause order is on file with the Commission and is by reference attached hereto as Exhibit F and made a part hereof to the same extent as if copied herein in full. The respondent filed a response to said show cause order within the time allowed therefor, a copy of said response being on file with the Commission and being by reference attached hereto as Exhibit G and made a

part hereof to the same extent as if copied herein in full. Thereafter, and after the date of the Department's order (Exhibit B hereto), the staff of this Commission made a further audit and examination of respondent's records and accounts pertaining to its plant account and filed with the Commission a supplemental report by reference attached hereto as Exhibit H and made a part hereof to the same extent as if copied herein in full.

11. By said supplemental report (Exhibit H hereto), the staff of this Commission, in derogation of said order of the Arkansas Department of Public Utilities (Exhibit B hereto), recommends in substance and effect that the Commission ignore the order and determinations of said Department with respect to the reclassification of respondent's plant account, the amounts and items pertaining thereto, the debits and credits and the dispositions thereof, irrespective of whether the said amounts or items grew out of or pertained to non-electric facilities not subject to the jurisdiction of this Commission, to electric facilities not subject to the jurisdiction of this Commission, or to electric facilities subject to the jurisdiction of this Commission.

12. Upon the filing of said supplemental staff report, this Commission issued its order requiring the respondent to show cause why the recommendations contained in the said supplemental staff report should not be approved, further requiring the respondent to submit a plan for the disposition of amounts assigned by said staff to the adjustment accounts, and further requiring the respondent to set forth in its response any

amounts disposed of since December 31, 1936 recommended for classification by said supplemental staff report in Accounts 107 and 108.15, together with the manner in which such disposition was effected.

13. The said supplemental report (Exhibit H hereto) assigns to the sub-accounts of Account 100 as of January 1, 1937, $35,082,500 or $254,161 less than the amounts, excluding sub-account 100.5 and affiliated company fees, assigned to such sub-accounts of Account 100 by the order of the Department of Public Utilities which is Exhibit B hereto. The difference between the assignments made by said supplemental staff report (Exhibit H hereto) and said order of the Department (Exhibit B hereto) is less than 1% and could not appreciably affect the determination of reasonable rates either for respondent's over-all electric system or for the sale of electric energy at wholesale in interstate commerce.

14. By its findings and order (Exhibit B hereto), the Department of Public Utilities of Arkansas assigned to Accounts 100.5 and 108 the amount of $11,867,691.04 and to Account 107 $7,691,563.60 as of the same date.

15. By its said supplemental report (Exhibit H hereto), the staff of the Commission, ignoring the assignment made in its original staff report (Exhibit E hereto) of the amounts thereby assigned to Account 100.5, arbitrarily, and without authority contained in the Commission's uniform system of accounts, transferred from Account 100.5 the amount assigned thereto as aforesaid, and recommended that the same be charged to a new account (numbered 108.15) not provided for

by the Commission's system of accounts, and added to the amount so transferred a reputed difference between the original and actual cost of all of respondent's ice, water, transportation, steam heat and gas properties as of January 1, 1937, thereby incorporating in Account 108.15 an amount of $9,293,057.46 or $2,574,633.58 less than was assigned by the Arkansas Department to Accounts 100.5 and to 108, representing system cost in excess of original cost.

16. The Arkansas Department of Public Utilities, by its order (Exhibit B hereto), assigned to Account 107 as of January 1, 1937, $7,691,563.60, being the excess of recorded costs as reflected in the plant account of the respondent as of said date over the actual cost of the properties of the respondent or affiliated interests, and, after approving certain amounts which had been disposed of by the respondent and which were properly creditable to said Account 107, directed that the remainder thereof, as of December 31, 1943, be charged to earned surplus or capital surplus created for that purpose, all of which has been fully complied with by the respondent.

17. In addition to the amount assigned to Account 107 by the Arkansas Department of Public Utilities, the supplemental staff report recommends that an additional amount of $4,189,635.63 be charged to said account. This additional charge is fully explained and consists of the items, debit and credit, as shown on the statement attached hereto as Exhibit I and made a part hereof to the same extent as if copied herein in full.

18. The amounts assigned by the Department

of Public Utilities to Accounts 100.5 and 107 or by the Staff of the Commission to either of said accounts or to Account 108.15 and the disposition thereof can have no bearing upon or relation to the determination of reasonable rates for electric energy sold by the respondent at wholesale in interstate commerce for resale.

19. Any action, order or proceeding on the part of this Commission changing or attempting to change any amounts or items classified and assigned by the Department of Public Utilities to Accounts 100.5, 107 or 108, or to direct any disposition thereof contrary to the orders of said Department, would result in an irreconcilable conflict between State and Federal regulatory agencies and would be not only an invasion and usurpation of powers of the State of Arkansas reserved under the Tenth Amendment to the Federal Constitution, but would also be beyond the sanction of the commerce clause of Article V of the Federal Constitution.

20. The Department, by its order (Exhibit B hereto), fixed and established an actual cost rate base for the respondent's electric system, representing the prudent investment which had been made by the respondent at arm's-length in properties used and useful in the public service. The Department further provided that the accounts of respondent, as established pursuant to said order, should represent and reflect the rate base so found. That rate base would be disturbed and the order of the Department with respect to such rate base would be nullified if the accounts reflecting the respondent's arm's-length investment

in its electric properties should be changed at the instance of this Commission.

21. Many of the items and amounts dealt with by the Department in its order (Exhibit B hereto) arose out of transactions and out of acquisitions of property wholly unrelated directly, incidentally or otherwise, to any facilities then or now used in interstate commerce. Therefore, exclusive jurisdiction to consider and direct the establishment or adjustment of accounts pertaining to these facilities is in the State of Arkansas.

22. The Utility Act of Arkansas, Act 324 of 1935, subjects the respondent to a heavy penalty for failure to observe and comply with the provisions of said Act and the rules and regulations and order promulgated by the Arkansas Department thereunder. The respondent, with respect to said items or any of them, cannot at the instance of this Commission make any debits, credits or disposition thereof other than as directed and ordered by the Arkansas Department without incurring the penalties provided in said Act 324.

23. As shown by the supplemental staff report (Exhibit H hereto), many of the items dealt with by the Staff and the disposition of which the Commission proposes to direct, have been recognized by said Staff as pertaining to respondent's transportation plant, steam heat plant, and its formerly-owned ice and water properties. These items are clearly and wholly without the jurisdiction of this Commission.

24. The primary, fundamental and dominant books of account kept by the respondent are sub-

ject to the jurisdiction and supervision of the Arkansas Department, inasmuch as the respondent is an Arkansas corporation, and its business and property are principally and primarily intrastate and have no relation to or bearing upon interstate commerce. Inasmuch as the primary and dominant books of account of the respondent so required to be kept under the jurisdiction of the Arkansas Department are substantially, if not exactly, the same as those prescribed by this Commission, and since the keeping of such records and books according to the orders, rules and regulations of the Arkansas Department will completely present all information essential to the exercise of the powers of this Commission with respect to the regulation of any interstate commerce carried on by the respondent, the Congress may not, under the commerce clause, empower this Commission to direct what, if any, items should be entered and disposed of in any such primary and dominant accounts of the respondent. Therefore this Commission cannot lawfully exercise the power asserted or attempted to be exercised pursuant to its said show-cause orders.

25. However, if in the judgment of the Commission the records and accounts of the respondent kept as required by the Arkansas Department should not adequately serve the purposes of the Commission with respect to the matters over which it has jurisdiction, the respondent now offers to maintain supplemental records and accounts in such form and in such manner as will provide the Commission with all information necessary or appropriate for the purposes of the administration of the Federal Power Act.

26. The orders in this cause require the respondent, among other things, to submit a plan for eliminating from its books of account the amounts assigned by the supplemental staff report (Exhibit H hereto) to the so-called adjustment accounts. In submitting a plan for the disposition of the items so assigned, other than the dispositions already made pursuant to the Arkansas Department's order (Exhibit B hereto), the respondent would be proposing to violate the Arkansas Statute (Act 324 of 1935). Especially is this true since many of the items included in said accounts have no relation whatever to the acquisition of facilities used in, or to transactions pertaining to, interstate commerce and, further, since all of said items have been definitely considered, determined, classified and disposed of by the Arkansas Department and the respondent's accounts have been adjusted to reflect the Department's findings, among other things, with respect to respondent's electric rate base.

Wherefore, the respondent prays (1) that the show cause orders issued herein be cancelled, set aside and for naught held; (2) or that such orders and the recommendations of said supplemental staff report be so amended as to require the respondent, in its response, only to treat and deal with items, amounts and transactions arising out of its acquisition of facilities actually used and useful in interstate commerce and not to deal or treat with items solely involving ice, water, steam heat, transportation, local electric distribution and intrastate transmission properties; (3) that the Commission rule forthwith the respondent not be required to make any debit, credit, dis-

position or other accounting entry in derogation or in conflict with the order of the Arkansas Department dated June 24, 1944 which has already been complied with by the respondent; (4) that the issues and matters raised by this motion be set for an early hearing and for oral argument before the Commission en banc, and (5) that the time prescribed for responding to the Commission's show cause order of September 27, 1944 be extended for a reasonable time after this motion has been disposed of.

Respectfully submitted.

ARKANSAS POWER & LIGHT COMPANY,

[SEAL]

By [s] C. S. LYNCH,
Executive Vice President.

Attest:

[s] L. GARRETT,
Secretary.

BRIDGES, BRIDGES, YOUNG & GREGORY,
Post office address: Simmons National Building,
Pine Bluff, Arkansas.

HOUSE, MOSES & HOLMES,
Post office address: Boyle Building,
Little Rock, Arkansas.

REID & PRIEST,
Post office address: Two Rector Street,
New York 6, New York.
Its Attorneys.

STATE OF ARKANSAS,
County of Jefferson, ss:

C. S. Lynch, being first duly sworn, deposes and says: that he is the Executive Vice-President of

Arkansas Power & Light Company, respondent herein; that he has read the foregoing petition and knows the contents thereof; and that the same are true to the best of his knowledge and belief.

[SEAL] [s] C. S. LYNCH

Subscribed and sworn to before me this 20th day of November, 1944.

[s] L. E. LEAS,
Notary Public.

My Commission Expires Oct. 1, 1947.

EXHIBIT I

ARKANSAS POWER & LIGHT COMPANY

Comparison of Amounts Assigned to Account 107 by Department of Public Utilities in its Order of June 24, 1944 and by Staff of Federal Power Commission in its Supplemental Report dated September 26, 1944

Item	Amount per D. P. U.	Amount per F. P. C.	Increase F. P. C. over D. P. U.
Excess over System Cost—Nov. 24, 1926	$6,209,465.50	$6,191,980.97	($77,484.50)
Excess over System Cost—Frank A. Reid Property—1927	912.12	912.12	
Excess over System Cost—Vernon B. Walters Property—1929	5,550.50	5,550.50	
Excess over System Cost—Wilson Power & Light Company	50,299.06	50,299.06	
Unamortized Debt Discount and Expense—Arkansas Central Power Company	300,000.00	450,000.00	150,000.00
Retirement Adjustments	605,989.04	874,064.04	268,074.40
Discount on Capital Stock	75,814.12	75,814.12	
Capital Stock Expense	254,442.06	254,442.06	
Contingency Reserve	120,190.74		(120,190.74)
Dunning Coal Company Acquisition		255,941.55	255,941.55
Pinon Power Plant Acquisition		212,212.54	212,212.54
Dumas Acquisition		36,960.00	36,960.00
Caddo River Power & Irrigation Company		1,030,000.00	1,030,000.00
Interest on Future Development—Remmel Dam		248,987.19	248,987.19
Construction and Supervision Fee		788,105.73	788,105.73
Arkansas Central Power Company		1,414,920.35	1,414,920.35
Total	$7,661,862.80	$11,921,199.33	$4,189,695.63

Exhibit 9 to the complaint is as follows:

UNITED STATES OF AMERICA—FEDERAL POWER COMMISSION

Before Commissioners: Basil Manly, Chairman; Claude L. Draper, Leland Olds, John W. Scott and Nelson Lee Smith.

JANUARY 2, 1945.

Docket No. IT-5829

IN THE MATTER OF ARKANSAS POWER & LIGHT COMPANY

ORDER SETTING HEARING

Upon consideration of the reclassification and original cost studies of Electric Plant as at January 1, 1937, filed June 3, 1940, by Arkansas Power & Light Company; the Commission staff's report thereon served on the Company with the Commission's order of June 15, 1943, and the response thereto filed September 18, 1943, by the Company; the Commission staff's supplemental report served on the Company with the Commission's order of September 27, 1944, and the response thereto filed November 27, 1944, by the Company; and the Company's motion to dismiss filed November 20, 1944;

The Commission *finds* that:

It is appropriate to carry out the provisions of the Federal Power Act that a hearing be held in this matter as hereinafter provided;

The Commission *orders* that:

(A) A public hearing be held commencing February 20, 1945, at 10 a. m. (E. W. T.) in the

Commission's Hearing Room, 1800 Pennsylvania Avenue, N. W., Washington, D. C., respecting the matters involved and the issues arising out of the proceedings in this matter;

(B) At such hearing the burden of proof to justify and to support by satisfactory proof every accounting entry, made or proposed to be made, which is brought into issue by the proceedings in this matter, shall be upon Arkansas Power & Light Company;

(C) At such hearing Arkansas Power & Light Company shall submit and support by satisfactory evidence an appropriate plan or plans for the disposition of any and all amounts which may, upon determination of the issues in this matter, be required to be classified in Account 107, Electric Plant Adjustments, or in Account 108.15, Common Utility Plant Acquisition Adjustments.

By the Commission.

LEON M. FUQUAY,
Secretary.

APPENDIX D

The Commission's order of January 9, 1945 *In the Matter of Arkansas Power & Light Company*, Docket IT–5829, is as follows:

ORDER AMENDING ORDER OF JANUARY 2, 1945

It appearing that the Commission's order of January 2, 1945, in the first paragraph refers to "the Company's motion to dismiss filed November 20, 1944," whereas reference in that regard should have been to "the Company's petition to dismiss filed November 22, 1944";

It is *ordered* that:

The first paragraph of the Commission's order of January 2, 1945, be and it is hereby amended by striking the words "the Company's motion to dismiss filed November 20, 1944" and substituting therefor the words "the Company's petition to dismiss filed November 22, 1944."

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

OCT 18 1946

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 543

FEDERAL POWER COMMISSION, *et al.*,
Petitioners,

v.

ARKANSAS POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 543

FEDERAL POWER COMMISSION, *et al.*,

Petitioners,

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ARKANSAS POWER & LIGHT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia (R. 48-63) is unreported.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, to review the judgment of the Court of Appeals entered June 28, 1946.

Question Presented

The question presented is neither adequately nor correctly stated by Petitioners. Their statement of the question errs in the following material respects:

(1) Its initial reference merely to "the proper amounts to be recorded in the accounts" (which might be special accounts for the information and purposes of the Federal Commission) diverts attention from the real issue as to control over the official corporate accounts[1] which "represent the actualities of the business" of Respondent. No question has been raised as to the right of the Federal Commission to a separate accounting for its own purposes.

(2) The recital that the Federal Commission has under consideration questions concerning amounts to be recorded seems misleading, since that Commission has disclosed its intent to exercise exclusive control over the Company's official corporate accounts, as to which the Arkansas Commission itself claims exclusive control (*infra*, pp. 11-13).

(3) The question stated omits reference to the jeopardy in which Respondent is placed by the conflicting claims of the Federal and State commissions. Respondent does not know which master it must serve as it has made and continues from day to day to make entries in its official corporate accounts under compulsion of the State Commission.

(4) The question presented by Petitioners does not clearly disclose that neither factual findings nor the exer-

---

[1] The official corporate accounts which are here involved were clearly characterized as follows by the court below:

> "There must always be an official recording of figures to represent the actualities of the business, to constitute the genuine record of stewardship, the basis upon which representations are made as to the real results of the utility's operations and its true financial condition in reports to stockholders and to the public, and in financial statements to be submitted to prospective investors or creditors. Merely to state this proposition is to demonstrate its soundness, since any reasonable mind immediately perceives that actual transactions can be truly reflected by only one set of figures. A differing set shows only a hypothetical situation, demonstrating the distinction between what is, and what might have been." (R. 50).

cise of administrative discretion can be involved.[2] The single question presented is a judicial question, the answer to which is dependent solely on the construction of the respective State and Federal statutes. Such a determination cannot be made by an administrative body. No order of the Federal Commission could limit or control the State Commission and no order of the State Commission could limit or control the Federal Commission.

Only slight paraphrasing of the language of the court below (R. 48-50) is required accurately to state the question presented as follows:

> Where a public utility company asserts its willingness to keep two differing sets of accounts in obedience to the dictates of the two Commissions (the Arkansas Public Service Commission and the Federal Power Commission) to which it is subject, but alleges that this will satisfy neither Commission, as each asserts the right to require the company to keep its official corporate accounts in the manner specified by it, and where the two Commissions insist on divergent and inconsistent action on the part of the company as to the same subject matter, is the company (having been placed in very real jeopardy) entitled, in a suit for a declaratory judgment, to a judicial determination as to whether the State Commission or the Federal Commission has exclusive regulatory control over its official corporate accounts?

Statutes Involved

The Declaratory Judgment Act is set forth in Appendix A infra. The relevant portions of the Arkansas Utility Act (Act 324 of 1935) are set forth in Appendix B, infra. The relevant portions of the Federal Power Act are set forth in Appendix C, infra.

---

[2] In this connection, the court below said, "As far as the declaratory judgment sought is concerned, the complaint does not challenge the correctness of, or justification for, any order of either commission with respect to the manner of recording transactions on the companies' books, or the allocation of items among prescribed accounts." (R., p. 49).

Statement

The only question decided by the court below was that of the jurisdiction of the District Court to determine a three-party controversy arising out of conflicting claims of the Petitioners on the one hand and the Arkansas Commission on the other. Each authority claims and asserts exclusive jurisdiction with respect to the same subject matter —Respondent's official corporate accounts.

The solution of the controversy and of the conflicting claims depends solely upon the proper construction of certain sections of the Federal Power Act and of the laws of the State of Arkansas. Neither the exercise of administrative discretion nor the consideration, weighing or balancing of any evidence is involved.

The Respondent, an Arkansas corporation, is a public utility within the meaning of Part II of the Federal Power Act and also within the meaning of Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935, and thus is subject, to the extent provided by said Acts, to regulation by the Petitioners and by the Arkansas Commission.

The jurisdictional claim of the Petitioners is based upon Section 301(a) of the Federal Power Act and that of the Arkansas Commission is based upon the proviso clause of said Section 301(a) and upon the Arkansas Act which confers comprehensive jurisdiction on that Commission.

As the court below said (R. 51), the Arkansas Commission on June 24, 1944 (Exhibit 2 to the complaint) "entered an exhaustive and carefully considered order. It determined that it had jurisdiction to prescribe the manner in which the company [Respondent] should keep its corporate books, accounts and records and that the books, records and

accounts prescribed by it should be the official corporate accounts and records. * * *"

The staff of the Federal Commission, after the date upon which the Arkansas Commission's order had become effective, re-examined Respondent's official corporate accounts and recommended that the Federal Commission require disposition of amounts in such accounts at variance with the treatment already given, and currently being given, those accounts under the mandate of the Arkansas Commission.

Although it had before it the Arkansas Commission's order, which had definitely claimed and exercised exclusive jurisdiction over Respondent's official corporate accounts and had prescribed a prudent investment rate base predicated upon the entries appearing in such accounts, the Federal Commission issued a supplemental order requiring Respondent to show cause why it should not make the adjustments in its official corporate accounts recommended by the Federal Commission's staff, which adjustments would be violative of the order of the State Commission. The text of the show cause order is reflected by Note 6 to the opinion below (R. 52).

After the issuance of this show cause order, the Arkansas Commission threatened to prosecute the Respondent under the provisions of the Arkansas statute and to enforce the penalties therein provided for any failure on the part of the Respondent fully to comply with all of the terms and conditions of the Arkansas order.

In an effort to resolve this jurisdictional dilemma, Respondent moved to dismiss the Federal Commission's show cause order on the grounds that its primary books of account are subject to the jurisdiction of the Arkansas Commission and that the exercise by the Federal Commission of the jurisdiction attempted to be exercised pursuant

to its show cause order would result in an irreconcilable conflict between the two regulatory authorities and would subject Respondent to penalties provided for in the Arkansas statute. As to this motion to dismiss, the Federal Commission has remained silent.

Realizing that its position is uncertain and perilous and that it will be forced to disobey one of the Commissions and to violate one of the two regulatory statutes, whatever course it may take, and prompted by a desire not to violate any law, Respondent complained to the District Court that the two regulatory bodies, by reason of their respective claims, have placed it in a vexatious and dangerous position. This suit to determine Respondent's rights and liabilities provides the two commissions with an appropriate forum in which to contest their respective conflicting claims of superior jurisdiction.

Both Commissions were made parties defendant. The relief sought is a declaratory judgment: (a) that the Federal Commission does not have the exclusive jurisdiction asserted by it over Respondent's official corporate accounts; (b) that the exclusive jurisdiction to regulate and supervise such accounts is vested in the Arkansas Commission; and (c) that, in the event it should be determined that the Federal Commission has the jurisdiction claimed by it, the Arkansas Commission does not have the jurisdiction which it claims and has exercised over said accounts.

The Arkansas Commission answered the complaint, claimed exclusive jurisdiction over said accounts, and admitted all of the allegations of the complaint, except that it denied that the Plaintiff, in any event, was entitled to a declaration that the Arkansas Commission had no jurisdiction over said accounts. That Commission also filed a cross-claim against the Federal Commission setting up its claim of exclusive jurisdiction and sought a declaration to that effect. Petitioners filed a motion to dismiss which was sus-

tained by the District Court upon the theory that Section 313(b) of the Federal Power Act provided the exclusive remedy for reviewing orders of the Federal Commission.

Upon appeal, the Court of Appeals for the District of Columbia held that an actual controversy (and justiciable issue) was disclosed, involving only a purely legal problem, that of interpreting the State and Federal statutes and determining which commission has exclusive control of the official corporate accounts in question, which entitled Respondent to a declaratory judgment. Accordingly, it reversed the order of the District Court with directions to deny the motion to dismiss and to proceed to determine the controversy.

Reasons for Denying the Writ.

The Myers and Macauley cases.

Petitioners place their principal reliance upon the opinions of this Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) and *Macauley* v. *Waterman Steamship Corp.*, No. 435, October Term, 1945, decided March 25, 1946. But it is quite obvious that these cases are clearly distinguishable from the case at bar and therefore are neither controlling nor persuasive here.

Both the *Myers* case and the *Macauley* case involved findings of fact. The case at bar involves *no such finding.* Neither case presented conflicting claims of exclusive jurisdiction asserted by two warring regulatory agencies, each claiming supremacy in the same field and over the same subject matter. In each case, "coverage" of the respective acts depended solely upon the nature and character of the activities involved, while here the record disclosed a controversy which does not involve the nature or character of any activities, but rather conflicting interpretations of the two statutes under consideration, the State Commission claiming, under the Arkansas Regulatory Act and the proviso clause of Section 301(a) of the Federal Power Act

itself, the sole right to supervise and regulate Respondent's official corporate accounts, and the Federal Commission claiming, under the Federal Power Act, the same exclusive right.

In the *Myers* case, the shipbuilding company claimed it was not engaged in interstate commerce. This claim necessarily involved a *finding of fact* as to the nature, character and extent of the company's operations.

In the *Macauley* case, the steamship company claimed it had a contract with the British Government rather than with an agency of the United States. This claim required a *finding of fact* as to whether the contract was actually with the United States, although appearing on its face to have been made with the British Government. In both cases, jurisdiction depended upon findings of fact.

Here, the conflicting claims of the two commissions rest upon, and are determined by, a construction of related Federal and State statutes. There is no issue as to the nature, character or extent of Respondent's operations; there are no facts to find and there is no room for the exercise of administrative discretion. Both the *Myers* and the *Macauley* cases involved mixed questions of law and fact, while here there is a purely legal problem—construction of the statutes of two sovereigns, and a determination, under the harmonized statutes, that one commission or the other has the regulatory power claimed by both, and which only one can exercise.

Petitioners' statement (Pet. Br., 9) that the "opinion of the court below completely ignores this Court's decision in the *Myers* case and all but ignores the recent reversal by this Court of its decision in the *Waterman Steamship* [Macauley] case" is at least highly disingenuous. The *Myers* case is expressly referred to in the dissenting opinion of Judge Morris, who says, "It has been urged that the *Myers* case could be distinguished from the instant case

because of the explicit language in the National Labor Relations Act not found in the Federal Power Act." And in our briefs in the court below, we not only directed attention to the peculiar language of the Labor Relations Act by which the District Courts were stripped of all jurisdiction of every character over the enforcement of that Act, but also urged that the *Myers* case both was not brought under the Declaratory Judgment Act and was decided before the effective date of the new Federal Rules, Rule 57 of which provides that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The opinion of the court below may not have referred specifically to the *Myers* case, but that case patently and obviously was considered by the court in arriving at its conclusion.

And the court below completely and conclusively distinguishes the *Macauley* case (R. 62, Note 17). Referring to the Federal Power Commission's argument that, because this Court had held in the *Macauley* case that the Tax Court, an administrative body, could construe the Renegotiation Act by deciding whether it applied to a given situation, the Federal Power Commission had the same right with respect to the Federal Power Act, the court below said:

> "* * * This argument overlooks the fundamental fact that something more is at stake here than merely to gauge the sweep of the federal statute. *For it is one thing for a federal administrative agency to rule as to the coverage of its own act when that act stands alone. It is quite another for the agency to decide whether its organic act over-rides the statute of a different sovereignty which already has been applied by the state authorities to the situation which the agency desires to control by applying the federal act. That is a task for the courts.* We do not understand Macauley case as extending to a federal agency the unprecedented power of exercising such a clearly judicial function." [Italics supplied.]

It is the *Macauley* case which, according to the Petitioners, the court below "all but ignores."!

Controversy not within administrative ambit.

The court below, in holding that the complaint stated an actual controversy, *did not ignore* the principle that provisions for appellate review of administrative action are exclusive. The court's opinion specifically recognized that principle (R., p. 61), but concluded that the pleadings did not present a controversy within the ambit of administrative action.

In reaching this conclusion, the court below took cognizance of the fact that here the principal controversy was between the two regulatory agencies, observing appropriately:

> "• • • Even if it be said that the Federal Power Commission has the right to exercise the judicial function of interpreting its own organic act, it could hardly be added that that agency also possesses the exclusive right to interpret a statute of one of the States of the Union, and to decide the relation between that state legislation and its own Act. This would be contrary to the purpose for which the Congress enacted the Federal Power Act, which was to supplement, not supersede, the regulatory power of the states."

The issue is not one which can arise only in or following an administrative proceeding. Indeed, the controversy between the two commissions exists independently of the Federal Commission's show cause order or of any final order which it may enter in the proceeding thereby initiated. It would exist if such proceeding were to be dismissed. Respondent patently cannot serve two masters in determining the entries to be made in its official corporate accounts. Each commission has declared in positive terms its intent to control such accounts. Each commission contends that it is enjoined by statute to regulate Respondent's official corporate accounts. The case at bar is not comparable to one in which the subject of regulation might or

might not come into existence, or the need of regulation might not arise, since it may not be assumed that either commission would consider itself free to disregard a statutory duty.

Actual and substantial controversy exists.

Since the controversy is real and the case is concrete, the rule stated by this Court in *Maryland Casualty Company* v. *Pacific Coal & Oil Company, et al.*, 312 U. S. 270, 273, (1941) applies:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. • • •"

See also *Borchard, Declaratory Judgments*, 2nd Ed., pp. 900-901.

Petitioners urge at some length (Pet. Br., 15-17) that there was no actual or immediately threatened invasion of the legal rights of either the Arkansas Commission or the Company, in the absence of which "a case or controversy" could not exist. This issue is dealt with definitively in the opinion of the court below (R. 58-60), the court's abundantly buttressed conclusion having been:

> "• • • it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission."

But if there previously had been any possible shadow of doubt as to the Federal Commission's position, that shadow

was wholly dispelled by its Opinion No. 138, *In the Matter of Northern States Power Company,* entered on July 3, 1946, in which that Commission asserts with all possible vigor that it, rather than any state tribunal, has complete and exclusive jurisdiction over the official corporate accounts of every public utility and licensee subject to its authority. In its *Northern States* opinion, the Federal Commission said:

> "The question which may arise by reason of the language used in Applicant's reservation is whether our accounting requirements control the fundamental or basic corporate books of account of a public utility or licensee. * * * Awareness of the foregoing fact [a self-serving and unwarranted conclusion on the part of the Commission] caused Congress to provide that our accounting authority be comprehensive and extend to the basic books of accounts of public utilities and licensees. * * *"

We are wholly in disagreement with this determination by the Federal Commission, but it could hardly have taken a more positive or unequivocal stand. And we are amazed at the failure of counsel to call the opinion in question to the attention of this Court.

Petitioners seek to create the impression that upon examination of the facts, they may not seek to direct any disparate entries in the official corporate accounts of the Respondent. But Petitioners have confirmed the charge that they will adopt a course in serious conflict with that adopted by the State Commission. Each system of accounts provides for the establishment in Account 100.5 of the difference between the original cost of electric plant acquired as an operating unit or system and the actual, bona fide cost thereof to the accounting utility. (Exhibit 1, p. 25; and Exhibit 4, p. 19). It is admitted that Respondent's general corporate books include in plant account a large amount of such excess costs. (Joint Appendix, p. 7, par. 12 and Ex-

hibit 2 to Complaint). The State Commission has ordered that such difference of more than $6,000,000 be retained in Respondent's accounts. Petitioners have declared that the Federal Commission cannot, in accordance with its system of accounts, permit such retention but must compel amortization or other disposition.[3] In *every* similar proceeding before it in which an amount was established in Account 100.5, the Federal Commission has ordered a disposition of the amounts there recorded.

First Iowa case not applicable here.

The case at bar is clearly distinguishable from *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 25, 1946, in which this Court held that the Federal Power Commission and other representatives of the Federal Government exercise comprehensive control over the development of the navigable waters of the United States, to the exclusion of state authority. Emphatically to the contrary, the Federal Power Act does not confer upon the Federal Commission exclusive or any authority over the official corporate accounts of public utilities if such accounts are required to be kept under and by authority of the laws of any state. Respondent is an Arkansas corporation, transacting substantially all of its business within that state and deriving more than 98% of its revenues from intrastate, as dis-

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[3] Thus, in its opinion in *Re The California Oregon Power Company*, 47 P. U. R. (NS) 193, the Commission said: "'Except for fictitious or paper increments, which should be charged off at once (American Teleph. & Teleg. Co. v. United States [1936], 299 U. S. 232, 240, 81 L. ed. 142, 16 P. U. R. (NS) 225, 57 S. Ct. 147), provision in advance of retirement should be made. In fact, such provision is mandatory under our, and most, if not all, systems of accounts. In practice, tangible plant assets are generally depreciated, whereas intangible assets are amortized. Accordingly, amounts in Account 100.5 should either be charged off immediately or spread over a reasonable period of time, if proper public utility accounting practices are to prevail.'"

Again, *In the Matter of The Montana Power Company*, 57 P. U. R. (NS) 193, 226, the Commission said: "Consistent with our action in similar cases heretofore decided, therefore, we reject Respondent's contention that the amounts should be kept in the accounts indefinitely without diminution by amortization or otherwise."

tinguished from interstate, sources (R. 51). Detailed citation of the legislative history of Part II of the Federal Power Act probably is not necessary in this connection, but that history is filled with assertions on the part of sponsors and proponents of this legislation to the effect that the new authority conferred upon the Federal Power Commission was *"conceived entirely as a supplement to and not a substitute for state regulation"*; that the policy of Congress was *"not to impair or diminish the powers of any state commission"*; that *"the bill takes no authority from state commissions"* and that *"Probably no bill in recent years has so recognized the responsibilities of state regulatory commissions."*[4]

To contend that the *First Iowa* case is controlling here overlooks the real issue in this litigation—the very basis of the claim of the Arkansas Commission. While Section 301 (a) of the Federal Power Act contains rather broad language giving the Federal Commission jurisdiction over accounts and accounting records, the proviso clause of that section, by its express terms, takes from the Federal Commission jurisdiction over "any accounts, memoranda or records which a public utility may be required to keep by or under authority of the laws of any state."

Therefore the extent and limit of the Federal Commission's jurisdiction over any accounts of a public utility can only be determined by exploring the applicable state statute and determining its actual effect. The proviso clause becomes operative only when particular accounts or records are required to be kept by or under the authority of a state. Its then effect is to withhold from the Federal Commission jurisdiction over any such accounts or records. And here it obviously is not possible to reconcile the conflicting claims of the two warring commissions without

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[4] *Jersey Central Power & L. Co.* v. *Federal Power Commission* (Diss. Op.), 319 U. S. 61 (1943), at pp. 85-88.

construing and determining the effect of the Arkansas statute under consideration. In no other case have State and Federal regulatory authorities asserted conflicting jurisdiction over the same official corporate accounts.

In the *First Iowa* case, this Court held that the effect of Section 9(b) of the Federal Power Act, thought to have left some control over hydro-electric projects with the states, had no such effect. The Court said: "The entire section is devoted to securing adequate information for the Commission as to pending applications for licenses. • • • It does not itself require compliance with any state laws." Thus the jurisdiction of the Commission over hydro-electric projects is determinable within the four corners of Part I of the Federal Power Act, and does not require the construction of any state statute, as in the case at bar.

As observed by the court below (R., 62), "Even if it be said that the Federal Power Commission has the right to exercise the judicial function of interpreting its own organic act, it could hardly be added that the agency also possesses the exclusive right to interpret a statute of one of the States of the Union and to decide the relation between that state legislation and its own Act."

The petition for certiorari rests upon the claim that no determination of Respondent's rights or liabilities can be made unless the Commission has first passed upon the question, even though the single question involved is purely judicial. The general rule requiring exhaustion of an administrative remedy is, basically, a rule of expediency, designed to permit a governmental agency to proceed with its administrative duties without undue delay. It is not intended to delegate the judicial function, and has application only when a ruling upon "coverage" is incidental to a discharge of special administrative duties. Respondent's application to a court for determination of a controversy which a judicial tribunal alone could decide did not stay

or interfere with Federal Commission's proceeding to reclassify amounts under its system of accounts.

We do not understand the holding in the *First Iowa* case that the Federal Commission "would have been justified in following its own interpretation of the Federal Power Act" to be the equivalent of a ruling that an interpretation by that Commission would have the force or effect of a judicial determination, much less that all courts must decline to discharge the judicial function of construing a statute until the Commission has spoken.

N. A. R. U. C. bulletin misapprehends scope of opinion.

The bulletin of the National Association of Railroad and Utilities Commissioners relied upon by Petitioners (Pet. Br., 18-19) apparently misapprehends the scope of the opinion of the court below. The bulletin asserts that any proceedings "where a state commission claims jurisdiction over any extension, or service, or over rates for any service, or with respect to any matter of regulation, to the exclusion of the F.P.C. * * * will give rise to a very considerable volume of Declaratory Judgment Act litigation."

On the contrary, it is respectfully urged that, in each of the circumstances enumerated, the jurisdiction of the Federal Commission would have to be determined on the basis of factual findings, as was true in the *Myers* and *Macauley* cases, and that, therefore, there would be no occasion for invoking the Declaratory Judgment Act. Section 204(f) and the proviso clause of Section 301(a) of the Federal Power Act respectively withhold from the Federal Commission jurisdiction over the issuance of securities and over official corporate accounts, if and when a State regulates the issuance of the former or requires the latter to be kept under its authority. It is only under *these provisions* of the Federal Power Act that the solution of a conflict or uncertainty as to jurisdiction would depend exclusively upon stat-

utory construction and would, therefore, afford an opportunity for exercise of the judicial function under the Declaratory Judgment Act.

Conclusion

The opinion of the court below is so carefully considered, so closely reasoned, that it is difficult to understand Petitioners' suggestion that the court's judgment be reversed without further briefs or argument. No precedents are cited for this startling recommendation and we presume that none could be cited.

The controversy ultimately to be determined by the District Court upon the merits is one of major significance, but the quite narrow question of jurisdiction decided by the Court of Appeals patently is not one of general importance. The lower court's opinion has not decided a question of substance relating to the construction or application of the Constitution or a Federal statute which has not been, but should be, settled by this Court; nor is it in conflict either with a decision of a Circuit Court of Appeals or with an applicable decision of this Court. It merely determines that "the present case presents an unusually appropriate opportunity for the exercise of the judicial function in the manner contemplated by the Congress when it enacted the Declaratory Judgment statute." (R. 61).

For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Declaratory Judgment Act

(49 Stat. 1027, Judicial Code, § 274(d), 28 U.S.C.A. 400).

(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, c. 231, § 274d, as added June 14, 1934, c. 512, 48 Stat. 955, and amended Aug. 30, 1935, c. 829, § 405, 49 Stat. 1027.)

APPENDIX B

Excerpts From the Federal Power Act

(49 Stat. 847, 854, 16 U.S.C.A. §§ 824, 825.)

§ 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale

of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. (16 U.S.C.A. § 824(a).)

§ 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof. (16 U.S.C.A., § 825(a).) (Emphasis supplied.)

§ 313. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the

Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). (16 U.S.C.A., §825 *l*.)

§ 315. (a) Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this Act or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this Act, or to appear by an

officer or agent at any hearing or investigation in response to a subpoena issued under this Act, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this Act but such forfeiture shall be in addition to any such penalty. (16 U.S.C.A., § 825n (a).)

§ 316. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, or any rule or regulation imposed by the Secretary of War under authority of Part I of this Act shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. (16 U.S.C.A., § 825o.)

APPENDIX C

Excerpts From Act 324 of the General Assembly of Arkansas (1935)

(Pope's Digest of the Statutes of Arkansas, §§ 2071, 2085, 2121, 2122.)

§ 8. (a) The Department herein created is hereby vested with the power and jurisdiction, and it is hereby made its duty to supervise and regulate every public utility in this Act defined, and to do all things, whether herein specifically designated, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

(c) The Department is hereby empowered, after hearing and upon notice, to make, and from time to time, in like manner, alter or amend such reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and of the practice and procedure governing all investigations by, and hearings and proceedings before the Department, as it may deem proper and not inconsistent with this Act.

§ 22(a). The Department, by order, may establish uniform system of accounts to be kept by any public utility subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and the Department may prescribe the manner in which such accounts shall be kept.

§ 61. (a) Every public utility, and every person, or corporation, shall obey and comply with each and every requirement of this Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in the matters herein specified, or any other matter in any way relating to or affecting the business of any public utility, and shall do everything necessary or proper in order to secure compliance with, and observance of, every such order, decision, direction, rule or regulation by all officers, agents, and employees of every public utility.

(b) Any person or corporation which violates any provision of this Act or fails to comply with every lawful order, decision, direction, rule or regulation made or prescribed by the Department, or any part or provision thereof, shall be deemed guilty of a misdemeanor and upon conviction, subject to a penalty of not less than $100 nor more than $1,000 for each such offense.

§ 62. Each violation of any of the provisions of this Act or of any lawful order or rule of the Department, or any part or portion thereof by any corporation or person, is a separate and distinct offense, and in case of a continuing violation after a first conviction each day's continuance thereof shall be deemed to be a separate and distinct offense.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 543

FEDERAL POWER COMMISSION, *et al.*,
Petitioners,

v.

ARKANSAS POWER & LIGHT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the United States District Court for the District of Columbia (R. 41-43) is reported in 60 F. Supp. 907. The opinion of the United States Court of Appeals for the District of Columbia (R. 46-69), is reported in 156 F. 2d 821.

Jurisdiction

The judgment of the Court of Appeals was entered June 28, 1946 (R. 70). The petition for writ of certiorari was filed September 27, 1946, and granted October 28, 1946. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Is a public utility company[1] entitled, in a declaratory judgment proceeding, to a judicial determination as to whether a State Commission or the Federal Power Commission has exclusive regulatory control over such Company's official corporate accounts[2], when

(a) the Company asserts its willingness to keep two differing sets of accounts in obedience to the dictates of the two Commissions, but alleges that this will satisfy neither Commission, since each demands that the Company's official corporate accounts be kept in the manner specified by it;

(b) the two Commissions insist on divergent and inconsistent action on the part of the Company as to its official corporate accounts;

(c) the Company does not know whether, in the day-to-day keeping of its official corporate accounts, it is following authoritative accounting requirements; and

(d) the Company is placed in very real jeopardy by these conflicting claims of jurisdiction, each implemented by severe criminal penalties?

---

[1] Respondent, as a "public utility" and as a "licensee", is subject to the comprehensive jurisdiction of the Arkansas Public Service Commission and also to the limited jurisdiction of the Federal Power Commission in respect of its electric properties and operations. Respondent is an Arkansas corporation. It also owned gas, transportation and steam-heat utility systems.

[2] The official corporate accounts which are here involved were clearly characterized (the soundness of the lower court's characterization of such accounts is recognized by the Federal Power Commission in its *Northern States Power Company* opinion; see pp. 6, 7, 25-27, *infra*) as follows by the court below:

> "There must always be an official recording of figures to represent the actualities of the business, to constitute the genuine record of stewardship, the basis upon which representations are made as to the real results of the utility's operations and its true financial condition in reports to stockholders and to the public, and in financial statements to be submitted to prospective investors or creditors. *Merely to state this proposition is to demonstrate its soundness, since any reasonable mind immediately perceives that actual transactions can be truly reflected by only one set of figures.* A differing set shows only a hypothetical situation, demonstrating the distinction between what is, and what might have been." (Emphasis supplied).

Statement

Petitioners' statement of the case is inaccurate in that it omits, perhaps understandably, certain facts which seem to us basic. These omissions include Petitioners' failure to disclose (a) the impact of the Federal Commission's show cause order on the Company's official corporate accounts and (b) the fact that this litigation could long since have been terminated (pp. 5, 6, *infra*) by any expression of willingness on the part of the Federal Power Commission to accept the offer (thus far ignored) of the Respondent Company to maintain *appropriate supplemental records*, rather than its *official corporate accounts*, in accordance with the requirements of the Federal Commission.

As our statement of the question presented indicates, judicial relief was sought by the Company for the purpose of determining a three-party controversy which arose out of conflicting claims of the Federal Power Commission on the one hand and the Arkansas Commission on the other. Each commission has asserted, and asserts, exclusive jurisdiction with respect to the same subject matter—the Company's official corporate accounts.

The jurisdictional claim of the Federal Power Commission is based upon Section 301(a) of the Federal Power Act and that of the Arkansas Commission is based upon the proviso clause of said Section 301(a) and upon the Arkansas Act which confers comprehensive jurisdiction upon the Arkansas Commission. See Appendices B and C hereto.

As the court below said (R. 50), the Arkansas Commission on June 24, 1944 (Exhibit 2 to the Complaint) "entered an exhaustive and carefully considered order. It determined that it had jurisdiction to prescribe the manner in which the company should keep its corporate books, accounts and records and that the books, records and accounts prescribed by it should be the official corporate accounts and records

of the company. * * *" [The Arkansas Commission's exact language is quoted at page 54 of Petitioners' brief].

The staff of the Federal Commission, *after the Arkansas Commission's order had been issued,* re-examined the Company's official corporate accounts and recommended that the Federal Commission require disposition of amounts in such accounts *at variance with the treatment already given,* and currently being given, those accounts under the mandate of the Arkansas Commission. These recommended dispositions included adjustments through surplus which patently could only be made through the Company's official corporate accounts.

Although (as the court below says) the Federal Commission had before it the Arkansas Commission's order, which had definitely claimed exclusive jurisdiction over the Company's official corporate accounts and had prescribed a prudent investment rate base predicated upon the entries appearing in such accounts, said Federal Commission issued a supplemental order requiring the Company to show cause why it should not make the adjustments in its official corporate accounts recommended by the Federal Commission's staff. As the Federal Commission must concede, those adjustments would obviously violate the order of the State Commission. Among other things, they plainly disclosed the Federal Commission's intent to force adjustments in the Company's official corporate accounts. [See particularly paragraphs (i) and (B) of the show cause order set forth in Note 6 to the opinion below (R. 52).]

After the issuance of the Federal Commission's supplemental show cause order, the Arkansas Commission threatened to prosecute the Company under the provisions of the Arkansas statute and to enforce the penalties therein provided for any failure on the part of the Company fully to comply with all of the terms and conditions of the Arkansas order (R. 15).

In an effort to resolve this jurisdictional dilemma, the Company petitioned the Federal Commission to dismiss its show cause order on the grounds that the Company's primary books of account are subject to the jurisdiction of the Arkansas Commission and that the exercise by the Federal Commission of the jurisdiction attempted to be exercised pursuant to its show cause order would result in an irreconcilable conflict between the two regulatory authorities and would subject the Company to the penalties[3] provided for in the Arkansas statute.

In its motion that the proceedings initiated by the Federal Commission's show cause order be dismissed (referred to at page 6 of Petitioners' brief), the Company made, and has since repeated in its briefs and on oral argument as the litigation has proceeded, this express offer:

> "However, if in the judgment of the [Federal] Commission the records and accounts of the respondent kept as required by the Arkansas Department should not adequately serve the purposes of the Commission with respect to the matters over which it has jurisdiction, the respondent *now offers to maintain supplemental records and accounts in such form and in such manner as will provide the Commission with all information necessary or appropriate for the purposes of the administration of the Federal Power Act.*" (Emphasis supplied) (Pet. Br., p. 78)

We repeat that this litigation could have been terminated literally within a matter of hours after an expression by the Federal Commission of its willingness to accept this offer. However, despite repeated challenges either to accept the offer or to reject it, the Federal Commission has remained,

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[3] In its Appendix A, quoting the "pertinent provisions" of the Arkansas Act, Petitioners' brief omits the provision making each violation a separate and distinct offense and each day's continuance after a first conviction "a separate and distinct offense."

and remains, significantly silent. The offer is now repeated in entire good faith.

The Arkansas Commission claims comprehensive and exclusive jurisdiction over the Company's corporate accounts and records. If the Federal Commission is willing to acknowledge that exclusive jurisdiction on the part of the Arkansas Commission and will accept, for its own purposes, supplemental or memorandum accounts in such form as it shall prescribe, this litigation is at an end. But unless the Federal Commission does an abrupt about-face, it cannot deny that *it* claims jurisdiction over the Company's official corporate accounts. And in that conflict of jurisdiction between the two Commissions lies the very real and actual controversy which made it so patently necessary for the Company to seek a declaratory judgment.

This issue is dealt with definitively in the opinion of the court below (R. 58-60), its abundantly buttressed conclusion having been:

> "• • • it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission."

Commission Has Taken Definite Position

Petitioners' statements and actions pleaded in the Complaint have been given even more definitive significance by the Federal Commission's Opinion No. 138, *In the Matter of Northern States Power Company*, 64 PUR (NS) 257, entered on July 3, 1946, in which the Commission asserts that it, rather than any state tribunal, has complete and exclusive jurisdiction over the official corporate accounts of every public utility and licensee subject to its authority. In this opinion, the Federal Commission said:

> "The question which may arise by reason of the language used in Applicant's reservation is whether our

> accounting requirements control the fundamental or basic corporate books of account of a public utility or licensee. * * * Awareness of the foregoing fact [a self-serving and unwarranted conclusion on the part of the Commission] caused Congress to provide that our accounting authority be comprehensive and extend to the basic books of accounts of public utilities and licensees.[4] * * *"

We are wholly in disagreement with this declaration by the Federal Commission, but it could hardly have taken a more positive or unequivocal stand. And the *Northern States* opinion is particularly significant in its clear recognition of the obvious fact that every public utility company must have a basic set of corporate accounts. The Federal Commission insists that it is master. The State Commission here asserts that *its* requirements control. Thus the dilemma with which the Company is confronted.

Conflict Irreconcilable in Character

The irreconcilable character of the conflict which has placed the Company under such a distressing cross-fire may perhaps best be illustrated by the strikingly diverse approach of the two commissions to Account 100.5, Electric Plant Acquisition Adjustments. This is the account in which the Company is required to record the difference between (a) the original cost of its electric property (i.e., the cost of such property to the person who first dedicated it to the public service) and (b) the bona fide, arm's-length cost of such electric property to the Company itself.

After having determined that this difference between the original cost and the actual, arm's-length cost of such electric property was $6,947,058.92 (R. 13), the State Commission directed that this amount be recorded in Account 100.5, and declared that such amount *represented value when ex-*

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[4] This language was used by the Federal Commission with special reference to the case at bar, which was singled out in footnote 5 to the Commission's opinion, 64 PUR (NS), at p. 261. This opinion is discussed at greater length at pp. 25-27, *infra*.

pended and at the date of the Commission's order and therefore should not be amortized or otherwise removed from the Company's official corporate accounts (page 23 of Ex. 2 to Complaint). Furthermore, the entire $6,947,058.92 was included by the State Commission in the prudent investment rate base on which the Company is entitled to earn a reasonable return.

On the other hand, the Federal Commission's Staff proposes to remove the $6,947,058.92 established by the State Commission in Account 100.5 and to establish it in Account 108.15 (R. 10) and the Federal Commission's show cause order requires the Company to submit a plan for disposing of the entire amount so to be established in Account 108.15.

The Federal Commission has uniformly construed its system of accounts to require that amounts in Account 100.5 (or in the corresponding Account 108.15) be written off. See *In the Matters of St. Croix Falls Minnesota Improvement Company* and *St. Croix Falls Wisconsin Improvement Company*, 43 PUR (NS) 1, 11 (1942); *In the Matter of The California Oregon Power Company*, 47 PUR (NS) 194, 195 (1943); *In the Matter of The Montana Power Company*, 57 PUR (NS) 193, 226 (1945). In the latter proceeding the Commission said:

> "Consistent with our action in similar cases heretofore decided, therefore, we reject respondent's contention that the amounts should be kept in the accounts indefinitely without diminution by amortization or otherwise."

The merits of this conflict between the accounting treatments of the two Commissions are not in issue here and the District Court was not asked to rule upon them. However, these facts are recited because they show conclusively that the Federal Commission will order adjustments in the Company's accounts at variance with the adjustments required by the State Commission because it (the Federal

Commission) *unfailingly interprets its system of accounts to require such adjustments.*

Counsel for the Federal Commission are challenged to assert that the Commission *has ever* permitted amounts comparable with the $6,947,058.92 here under consideration to remain unamortized on the books of *any* company which it considered subject to its jurisdiction.

As Homer Kripke says in a Harvard Law Review article referred to in Petitioners' brief:[5]

> "The Power Commission has clearly committed itself to the conclusion that all Account 100.5 items which are associated with intangibles shall be amortized in a relatively short period of years by charges to Account 537, where they will appear as income deductions rather than as operating expenses."

Approximately $6,000,000 of the $6,947,058.92 here in question may be said to be "associated with intangibles", although representing bona fide actual investment, and, therefore, there can be no doubt as to the Commission's intentions. Indeed, this particular aspect of the irreconcilable conflict between the Federal Commission and the Arkansas Commission stems directly from the Federal Commission's system of accounts, which has always been interpreted by the Federal Commission to require the writing off of bona fide investment recorded in Account 100.5. Thus the question of whether a controversy exists cannot be said to depend upon facts yet to be found in a hearing held for the purpose of examining the Company's particular accounts.

Realizing that its position is uncertain and perilous and that it will be forced to disobey one of the Commissions and to violate one of the two regulatory statutes, whatever

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[5] Kripke, *"A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107"*, 57 Harv. L. R. 433 and 693, at page 455.

course it may take, and prompted by a desire not to violate any law, the Company complained to the District Court that the two regulatory bodies, by reason of their respective claims, have placed it in an impossible position.

This suit to determine the Company's rights and liabilities provides the two Commissions with an appropriate forum in which to contest their respective conflicting claims of superior jurisdiction. Both Commissions were made parties defendant.

The relief sought is a declaratory judgment: (a) that the Federal Commission does not have the exclusive jurisdiction asserted by it over the Company's official corporate accounts; (b) that the exclusive jurisdiction to regulate and supervise such accounts is vested in the Arkansas Commission; or (c) that, in the event it should be determined that the Federal Commission has the jurisdiction claimed by it, the Arkansas Commission does not have the jurisdiction which it claims and has exercised over said accounts.

The Arkansas Commission entered its appearance[6], answered the Complaint, claimed exclusive jurisdiction over said accounts, and admitted all of the allegations of the Complaint, except that it denied that the Company was, in any event, entitled to a declaration that the Arkansas Commission had no jurisdiction over said accounts. The Arkansas Commission also filed a cross-claim against the Federal Commission setting up its claim of exclusive jurisdiction and seeking a declaration to that effect. Petitioners filed a motion to dismiss, which of course had the effect of admitting the allegations of the complaint. This motion was sus-

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[6] In its written entry of appearance, the Arkansas Commission (then Department) said: "The Department voluntarily submits to the jurisdiction of the court in this cause for the reason that the complaint presents to this court for decision issues arising under the constitution and laws of the United States and the constitution and laws of Arkansas which, if decided adversely to the interests of the State of Arkansas, would destroy one of the fundamental powers of the State of Arkansas * * *" (R. 23)

tained by the District Court upon the theory that it had no jurisdiction of the subject matter of the complaint because Section 313(b) of the Federal Power Act provided the exclusive method for reviewing orders of the Federal Commission. The District Court added that the Company had not exhausted its administrative remedies under the Act (R. 42-43).

Purely Legal Question Presented

Upon appeal, the Court of Appeals for the District of Columbia held that an actual controversy (and justiciable issue) was disclosed, presenting only a purely legal problem, that of interpreting the State and Federal statutes and determining which Commission has exclusive control of the official corporate accounts in question, which entitled the Company to a declaratory judgment. Indeed, one question and one question only was decided by the Court of Appeals, i.e., that the present case "presents an unusually appropriate opportunity for the exercise of the judicial function in the manner contemplated by the Congress when it enacted the Declaratory Judgment statute." (R. 61).

Summary of Argument

The question presented—whether, in the circumstances of this case, the State Commission or the Federal Commission has exclusive regulatory authority over the Company's official corporate accounts—is solely a legal question. It patently requires the exercise of the judicial function. It cannot be answered by either of the two warring administrative agencies.

The conflict between the two administrative tribunals is irreconcilable and, far from being speculative or conjectural, it is direct and positive. On the one hand, the State Commission has claimed, and is now exercising, exclusive jurisdiction over the Company's official corporate accounts. On the other hand, the Federal Commission has claimed,

and fully intends to exercise, exclusive jurisdiction over the same official corporate accounts. Furthermore, the position taken by the State Commission as to an item of more than $6,000,000 required by it to be recorded and maintained in the Company's accounts is obviously irreconcilable with the position taken by the Federal Commission as to such items both here and in *every accounting reclassification proceeding* before that Commission.

Neither Commission will yield to the other. Neither is satisfied with the keeping of memorandum or supplemental records for its own purposes, the Federal Commission having completely ignored an offer by the Company to keep supplemental records in whatever form that Commission might require. And the Company may suffer onerous criminal penalties if it fails to obey any order of either Commission.

Judicial determination obviously was necessary and the declaratory judgment sought was an appropriate remedy[7], particularly since the administrative remedy provided by the Federal Power Act is not adequate; indeed, no administrative procedure for determination of the instant controversy is available. Decisions of this Court applying the rule that a private litigant may not be entitled to judicial relief until he has had "prior resort" to an administrative tribunal or has exhausted his administrative remedy clearly are neither controlling nor applicable in the circumstances of the case at bar.

The carefully considered, closely reasoned opinion of Judge Miller, speaking for the court below, should be affirmed.

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[7] As Professor Borchard (Declaratory Judgments, 2d Ed., 1941, pp. 900-901) says, a declaratory judgment proceeding provides the two Commissions with an appropriate forum in which to "contest their respective claims to rights, powers, duties and immunities, each seeking to maintain the superiority of its own claim to advantages or exemptions over that of its adversary."

ARGUMENT

Introduction

In introducing their argument, Petitioners have not only confused certain issues and misapprehended others, but have also, we are sure unintentionally, misrepresented several of the Company's contentions. Therefore it seems necessary to comment on some of their introductory remarks.

On page 15 of their brief, Petitioners, after noting the requirements of Section 301(a), quoting its proviso, and referring to the requirements of the Arkansas law, say that the Company and the court below assumed that both Federal and State statutes apply to the Company's official corporate accounts. It is clear that the court below made no such assumption, for it specifically held that "we are not now concerned with deciding which commission possesses the exclusive right of control which both claim" (R. 47). What the court below did hold, on the other hand, was that the Complaint stated a justiciable issue within the purview of the Declaratory Judgment Act; that the Company was entitled to a determination of the dispute between the State and Federal Commissions; that it was the right and duty of the District Court to take cognizance of the purely legal issue presented for decision; and that it was error to grant the Petitioners' motion to dismiss.

The Company has never assumed that the Federal statute applied to its official corporate accounts in these circumstances, but on the contrary has contended that the Federal statute did not confer upon the Federal Commission any authority over those accounts and records which were required to be kept by and under the authority of the laws of the State of Arkansas. The Company does contend, however, that the Federal Commissioners, by the course of action set out in the Complaint, are assuming power which

was never conferred upon them. The Company does not complain of the impact of the Federal statute, but only of the conduct of the Petitioners assuming to act thereunder.

The Company did not say or imply, either at page 14 of its Brief in Opposition or elsewhere, as asserted by Petitioners (Pet. Br., p. 15), that "if the State's accounting requirements are made exclusive by State law, the proviso in Section 301(a) quoted above 'withholds from the Federal Commission' all power to require the maintenance of different records for Federal purposes." What the Company did say and now repeats was that the "proviso clause becomes operative only when particular accounts or records are required to be kept by or under the authority of a state. *Its then effect* is to withhold from the Federal Commission jurisdiction *over any such accounts or records.*" (Brief in Opposition, p. 14; emphasis supplied.)

The Company has not contended and does not now contend that it may not be required to keep accounts differing from those it is required to keep under the Arkansas law if the Federal Commission so orders, but it submits that those different accounts, kept at the instance of the Federal Commission, may not be treated as its official corporate accounts reflecting its earnings, its investment and its financial condition.

Neither Commission Will Play Second Fiddle

The controversy and conflict with which the Company is confronted arose because neither Commission wanted to play second fiddle. Each wants to be concert master and each definitively asserts exclusive control over the same set of accounts—the Company's official corporate accounts—, claiming the authority to dictate the entries made and currently being made therein. If either Commission had indicated its willingness to accept and be satisfied with a supplemental or memorandum set of accounting records,

there would have been no occasion for this law suit. But since neither Commission was satisfied with secondary records, the Company believes, and respectfully urges, that it is entitled to a declaration as to which Commission has the controlling authority that both now claim.

Petitioners assert (Pet. Br., p. 14) that the Federal Commission has assumed that its authority cannot be limited by State action and that this Court so held in *Northwestern Electric Company* v. *Federal Power Commission*, 321 U. S. 119 (1944). Of course, State action could not limit authority *actually granted by Congress* to the Federal Commission. That is not the issue here. It is: What is the authority which the Congress has conferred upon the Federal Commission under Section 301(a) of the Federal Power Act when construed in the light of state authority exercised under, and conferred by, state law? That question was not decided in the *Northwestern* case. There was no factual predicate for its presentation in that case, because there the action of the Federal Commission did not purport presently to affect or constrain State action within the State sphere of authority, while here the Federal Commission not only proposes to modify or reverse State action but, as alleged in the Complaint, is actually usurping and attempting to exercise power expressly left with the States by Congress.

In the *Northwestern* case, the Court did not determine the effect of the proviso of Section 301(a) relied upon here as giving vitality to the claim of the Arkansas Commission. While in the *Northwestern* case the Court said that State Commission action in the accounting field is subordinated to Congress' appropriate exercise of the Commerce power, that observation falls far short of asserting or attempting to assert the extent to which Congress has exercised that power or what authority, pursuant to its exercise, has been conferred upon the Federal Commission. And such observation obviously may not be construed as giving to the

Federal Commission exclusive or any authority over "*any accounts, memoranda or records which such public utility may be required to keep by or under authority of the laws of any state.*"

The Court is not here concerned with what Congress has the power to do or even with what it might have done. No issue is made of those questions. But the district court, when this matter is returned to it for further action, will be concerned with the force and effect of what Congress *has* done, what authority it *has* conferred upon and what authority it *has withheld* from the Federal Commission and left with the State of Arkansas.

In the *Northwestern* case, no State Commission was claiming or contesting the authority asserted and exercised by the Federal Commission. On the contrary, the regulatory authorities of Washington and Oregon, the only state agencies which might have complained, filed briefs *amici curiae* in the Circuit Court supporting in every respect the contentions made by the Federal Commission and opposing those made by the Northwestern Company.

State Commission Has Broad Powers

Petitioners suggest (Pet. Br., pp. 17-18) that, in determining the powers and claims of the two Commissions, consideration should be given to the relation of the Federal Commission's accounting functions to the dividend, merger, security issue and rate provisions of the Federal Power Act and to the accomplishment of the independent objective of regulation "by the informatory process".

Petitioners erred in implying that the Federal Commission has power to regulate the issuance of securities by Arkansas utilities which are Arkansas companies. Since Arkansas specifically authorized its Commission to regulate such securities, their regulation is withheld from the Federal Commission by Section 204(f) of the Federal Power Act to the same extent and in the same manner that

regulatory power over accounting records subject to state authority is withheld from the Federal Commission by the proviso clause of Section 301(a).

Furthermore, the Arkansas Commission has all of the powers which Petitioners mention in Note 13 at page 18 of their brief, as well as very real additional powers, the most significant of which is its plenary power over the Company's earnings, substantially all of which are derived from intra-state sales of electric energy (R. 50).

In view of the broad, comprehensive regulatory powers conferred upon the Arkansas Commission, there obviously is reason why the courts, when they consider the intent of Congress and finally determine which Commission has the power both now claim, should determine that the relation of the accounting functions of the Arkansas Commission to its other and comprehensive powers is emphatically more significant than the relation of the accounting functions of the Federal Commission to its more abridged, more truncated powers.

We submit that the policy underlying the amendments made to the Federal Power Act in 1935 and their legislative history show that the Congress was moved to insert the vitally significant proviso in Section 301(a) out of respect for *"state rights and local institutions even when some degree of efficiency of a Federal plan is thereby sacrificed."*[8]

I

This is a Case of "Actual Controversy" Cognizable by the District Court under the Declaratory Judgment Act.

Petitioners' statement of the "actual controversy" at page 33 misapprehends the real issue and brings the controversy within too narrow a compass when it states that

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[8] See Mr. Justice Jackson's interesting discussion of this theory in *Connecticut Light & Power Company* v. *Federal Power Commission*, 324 U. S. 515, 530 (1945).

we are concerned merely with conflicting claims of "an exclusive right to require classification and adjustment of 'write-ups' and other excesses over original cost in respondent's capital accounts." To the contrary, the actual controversy arises out of conflicting claims as to authority over those accounts which are deemed to be the Company's official corporate accounts. The facts recited in the Bill of Complaint as to the classification and disposition of amounts in Account 107 and Account 100.5, the so-called adjustment accounts, do not define the issue. They were included solely for the purposes of showing both the existence of an actual conflict and the impossibility of having dual controls over the official corporate accounts of a utility company.

Petitioners' basic premise is that "until the administrative process has been completed, the impact of the [Federal] Commission's accounting authority is obviously too contingent, speculative, and conjectural to present any justiciable issue" (Pet. Br., p. 33).

If we disregard Petitioners' attempt to narrow the scope of the controversy to a conflict merely as to adjustments required to be made in Accounts 107 and 100.5, and look at the real issue—control over the Company's official corporate accounts—the conflict between the two Commissions becomes actual, positive and anything but contingent, speculative or conjectural.

Federal Commission Intended to Control Corporate Accounts

The Complaint, after describing various actions of Petitioners, alleges (paragraph 23) that, in issuing their show cause order (Ex. 7 to the Complaint), Petitioners unlawfully sought to exercise power and authority not conferred upon them by Congress and intended to control and direct

the recordation of entries in the Company's official corporate accounts (R. 11).

This allegation is supported by allegations of facts in the preceding paragraphs 21 and 22 of the Complaint, and by the text of the Federal Commission's show cause order (Ex. 7 to the Complaint), all of which support the general allegation. Paragraph (B) of that order reads as follows:

> "The Company shall file a response, under oath, within sixty days after the date of this order, to the recommendations contained in the supplemental report herewith to be served upon the Company, including a plan for disposition of amounts in the adjustment accounts. In such response the Company shall set forth any amounts disposed of since December 31, 1936, which are recommended for classification by the staff in Accounts 107 and 108.15 together with the manner in which such disposition was effected" (Pet. Br., p. 68).

The recommendation of the Federal Commission's staff set forth in paragraph (i) of its show cause order is that charges of more than $9,000,000 be made to earned surplus or capital surplus.[9]

Thus it was obvious that any plan for making "disposition of amounts in the adjustment accounts" was intended to apply to the Company's official corporate accounts. No charge could be made to capital surplus, for example, except in the official corporate accounts, because capital surplus could not conceivably be created, for that or any other purpose, upon mere supplemental or memorandum accounts. This is recognized by the Federal Commission itself in its *Northern States* opinion, *infra*, pp. 25 to 27. It therefore is clear that, in relating the Commission's show cause order to its own basic corporate books of account, the Company

[9] As a practical matter it was apparent that most of the charges would have to go to capital surplus, since the Company's earned surplus was relatively small (Ex. 2 to Complaint, p. 31).

was not "attributing any untoward significance" (Pet. Br., p. 35, footnote 27) to that order.

The Company kept only one set of official corporate accounts, in which the adjustments ordered by the State Commission have been recorded (R. 7), and the show cause order (Pet. Br., p. 65) neither excludes those accounts from its impact nor indicates that supplemental records set up for the use of the Federal Commission might be acceptable to it. Furthermore, the show cause order requires the Company to submit a plan for the disposition of amounts in the adjustment accounts and to set forth all amounts disposed of since December 31, 1936. Thus the allegation of the Complaint that the Federal Commission, by issuing its show cause order, is asserting exclusive jurisdiction over the same records claimed by the State Commission to be within *its* exclusive jurisdiction, becomes more than prophecy, conjecture or mere speculation, for the reason that the very items dealt with in the show cause order were necessarily to be recorded in the very records over which the State Commission claims and has exercised exclusive jurisdiction.

The court below was not required to rely on past decisions of the Federal Commission, since that Commission's intent is clearly shown by its said show cause order and was adequately pleaded. *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932), referring to the possibility of diverse interpretations of various contracts, clearly is not in point.

The rule stated in *Cohen* v. *United States* (C.C.A. 8th, 1942), 129 F. 2d 733 (Pet. Br., p. 35) becomes immaterial when, as is the case here, proper grounds adequately support the challenged decision. The following statement in that decision is, however, pertinent to the instant case:

> "• • • When a motion to dismiss is interposed the complaint must be construed in a light most favorable

to the plaintiff, and it should not be dismissed if it is reasonably conceivable that at the trial the plaintiff might establish a cause of action."

That the Petitioners did intend to exercise control over the Company's official corporate accounts is also made evident by the fact that Petitioners in effect refused (and certainly have ignored) the Company's offer "to maintain supplementary records and accounts" for the Federal Commission, *supra*, pp. 5, 6. The Company is not seeking to restrain and, of course, is not entitled to restrain the Federal Commission from holding a hearing or making a reclassification of the Company's accounts or obtaining other information required for such Commission's administrative purposes. The Company merely seeks to prevent the recordation of the reclassification adjustments resulting from such hearing in its official corporate accounts. Its offer to keep a memorandum set of records reflecting any reclassification of accounts ordered by the Federal Commission, so long as they are not recorded in any accounts which the Company must keep by or under the authority of the laws of the State of Arkansas, still stands.

We find it impossible to believe that Petitioners have not intended, and do not now intend, to claim control over the Company's official corporate accounts as alleged in the Complaint, or that such a course is not made apparent by their actions as pleaded. Furthermore, since Petitioners have plainly construed the Act to require that they exercise this control, it should have been apparent to the District Judge that he need not wait for the impact of further Commission action; for, if the Act has the meaning which they ascribe to it, Petitioners could not waive its requirements and the controversy could be settled only through exercise of the judicial function.

The facts adverted to constituted sufficient support for the general allegation of intent. The court below was not

required to rely upon the Federal Commission's "consistent adherence to the original cost standard in its prior decisions"; but was fully justified in relying upon the "position taken by the Commission's staff in the reports served on respondent" and "the unmistakable tenor of the Commission's order serving the supplementary staff report", referred to at pages 34 and 35 of Petitioners' brief.

Petitioners next contend that there is no support for the conclusion that one authority and only one could so control the keeping of the Company's official corporate accounts that the exercise of such control by one authority necessarily excludes its exercise by the other. This conclusion is one of fact which is adequately pleaded in the Complaint (R. 15, 16).

The facts relied on clearly reveal an exercise of power by the State Commission which excludes action by the Federal Commission in respect of the Company's official corporate accounts. The State Commission directed that the corporate books, accounts and records, reflecting the classification of accounts ordered by that Commission, "shall be the official corporate accounts and records of the company" (Pet. Br., p. 54). The Complaint, in addition to pleading basic facts, alleges:

> "* * * From the entries recorded and set forth in said primary, dominant and principal books of accounts the plaintiff must, from time to time, compile and circulate, for the information of its bondholders, preferred and common stockholders, and the public, annual statements, and the said entries recorded in said books provide the basic data for the payment of bond interest and the declaration of dividends under the laws of the State of Arkansas.
>
> "For the purposes aforesaid, the plaintiff cannot have two sets of books of accounts containing different, conflicting entries" (R. 15, 16).

The fact that there can be but one set of accounts for such purposes is well pleaded as a conclusion of fact and must be accepted as true for all purposes of the motion to dismiss. Petitioners argue that the Arkansas statute does not purport to establish any exclusive system of accounts and that the Arkansas Commission's order does not contain any language of exclusion. But the Arkansas statute does authorize the State Commission to prescribe the accounts to be kept by a subject utility in language which is fully as broad and comprehensive as the grant of authority found in the Federal Power Act and which contains no proviso or exception whatsoever. Acting pursuant to such authority, the State Commission *did* prescribe and direct that the official corporate accounts of the Company should be kept in accordance with its system of accounts. Petitioners, at page 41 of their brief, include an excerpt from the State Commission's order with a statement that the jurisdiction referred to had regard to utility rates. Replacing this excerpt in its context, the full statement in the order reads as follows:

> "Respondent is an Arkansas corporation and is engaged exclusively in intrastate business. The Department has jurisdiction to 'establish a uniform system of accounts' to be kept by Respondent and to 'prescribe the manner in which such accounts shall be kept'. The Department, therefore, finds that it has jurisdiction to prescribe the manner in which the Respondent keeps its corporate books, accounts and records, and that the books, records and accounts so prescribed by this Department shall be the official corporate accounts and records of the Company. Its jurisdiction over Respondent and its electric and other operations is complete and comprehensive and the Department is the only regulatory authority having such all-inclusive jurisdiction" (Pet. Br., p. 54).

The language used by the State Commission can have no other meaning than that its jurisdiction over the Company's official corporate accounts is and should be exclusive.

Only One Regulatory Authority Can Control Corporate Accounts

It is axiomatic that a utility's official corporate accounts cannot be made subject to more than one over-all control. As a matter of common knowledge, ordinary business practices compel a corporation to report to its stockholders and prospective investors and, in such reports, to produce certain and definite figures showing net worth and net income.

The term "official corporate accounts" is used to designate that set of accounts which the Company and others consider as reflecting the general status of the Company's financial affairs—its financial condition as related to the basic and primary purpose for which accounts are kept—a record of its stewardship for the beneficial owners so that the corporate entity, as their agent, may render a report. The importance of understanding the distinction between such official corporate accounts and the broad range of accounts which a corporation may desire or may be compelled to keep, or the specialized accounts kept for particular information or purposes,[10] cannot be overemphasized. Certain of the reported cases dealing with accounting indicate confusion as to this distinction, or even a complete lack of understanding of it. Companies have various supplementary accounts, kept in accordance with differing regulatory requirements, which may proceed upon different bases and produce diverse results. But it must be completely apparent that, in the use of accounting processes to report upon its stewardship, a corporation cannot present varying conclusions as to net worth or net income and, in effect, say to all of its owners and prospective investors that each may choose whichever of the various figures he desires. Accounting for stewardship obviously is the primary objective

[10] Other and special sets of accounts, or partial sets for particular purposes, commonly are kept to supply information for federal income taxes, state income taxes, state or federal insurance contributions and numerous other purposes.

in corporate accounting. Corporations cannot endure without it. Such basic accounting existed before the various and diverse requirements of income and other tax or regulatory needs appeared and it will, of necessity, continue although each of these other exactions may disappear.

Federal Commission Has Recognized Distinction Between Corporate and Other Accounts

Petitioners cannot maintain their contentions in the face of positive statements made by the Federal Commission itself in its Opinion No. 138, *In the Matter of Northern States Power Company*, 64 PUR (N. S.) 257 (1946), *supra*. These positive statements were not made as findings upon evidence. They clearly show that the proposition which the Company and the Court of Appeals considered fundamental was so recognized and considered by the Federal Commission. In its opinion, the Federal Commission, being apprehensive that a reservation made by the Northern States Company in respect of a plan of disposition disclosed an intention to comply with the Commission's requirements in memorandum accounts only, stated:

> "It is not clear from the above language whether the Company, at some time in the future, intends to maintain its corporate accounts with respect to the plant acquisition adjustments in a manner different from the requirements of the Uniform System of Accounts and our order in this proceeding, or if it merely entertains the desire to set up memorandum accounts for the purpose of keeping a record of the amounts which it now proposes to write off. By reason of this lack of clarity we deem it appropriate to set forth our views on the question which may be inherent in this reservation. Section 301(a) of the Federal Power Act authorizes this Commission to prescribe a system of accounts and requires public utilities and licensees to keep their accounts, books, records, etc., in accordance therewith. Our comprehensive authority and jurisdiction in the matter of accounting was settled by the Supreme Court in the *Northwestern* case.

"*The question which may arise by reason of the language used in Applicant's reservation is whether our accounting requirements control the fundamental or basic corporate books of account of a public utility or licensee.* We have previously considered this identical matter. In the *Northwestern* case, where the utility maintained that the Commission's authority was limited to the prescription of memorandum accounts, we said:

> 'In view of the provisions of the Federal Power Act and the decisions of the United States Supreme Court, there can be no doubt about our authority to require the company to keep general corporate and other fundamental accounts and records covering its entire electric utility business in conformance with the provisions of our system of accounts.'

* * * * *

"If public utilities and licensees are permitted to reflect in their basic corporate books of account *entries at variance* with those required under the Uniform System of Accounts prescribed by this Commission, or our orders issued with respect thereto, the way would be immediately opened for a return to the accounting abuses revealed by the Federal Trade Commission's investigation.

"Awareness of the foregoing fact caused Congress to provide that our accounting authority be comprehensive and extend to the basic books of accounts of public utilities and licensees. This authority is set forth specifically in Section 301 of the Federal Power Act and is supplemented by other provisions of the Act, including Section 302 which deals with the fixing of depreciation rates and accounting for depreciation, Section 305 which prohibits the payment of dividends from funds includible in capital account, and the provisions of Section 203 dealing with consolidations and mergers. Frequently the most important question presented in consolidation and merger proceedings relates to possibility of introducing inflation in the plant accounts and the capital structure, and this the Com-

mission would be unable to prevent if the utility's basic corporate accounts are not kept according to its orders. In other words, if the corporate accounts in respect to the capital, surplus plant and depreciation in particular, are not kept according to this Commission's requirements, important provisions of the Federal Power Act will be rendered nullities.

"Of course, public utilities and licensees may keep *such other supplementary and memorandum accounts* as well as subdivisions of the accounts prescribed in our uniform system, as may be necessary or appropriate, provided that the integrity of our uniform system, an essential element in the administration of the Federal Power Act, is not impaired.

"Therefore, Northern States Power Company *is required to reflect the entries prescribed by our order herein on its fundamental corporate books of account,* and we will consider any failure to do so a violation thereof." (Emphasis supplied).

These positive assertions as to what the Federal Commission believes to be its comprehensive accounting jurisdiction are not directed to "the quasi-legislative act of prescribing accounting requirements" (Pet. Br., pp. 44-45), but to the intent of Congress in enacting Section 301(a), which obviously is a question for judicial decision.

How can the Federal Commission argue, within the rule of *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), that its final order may be "of such a character as not to affect" the Company's official corporate accounts? No findings of facts or exercise of technical judgment by an administrative body are required to determine or shape the question presented. Nor is any attempt made to review an interlocutory or procedural order, as in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938), or *Aluminum Company of America* v. *Federal Power Commission* (C. C. A., Dist. Col., 1942) 130 F. 2d 445 (1942). The fact that the Company's petition ask-

ing the Federal Commission to limit the issues framed by its show cause order, so as to eliminate the claim of comprehensive accounting jurisdiction which the Federal Commission would now evade, has not been ruled upon by that Commission does not support Petitioners' position. That petition was filed at an intermediate stage in the Federal Commission's proceeding, but its significance lies in the opportunity—ignored by the Commission—which it presented for clarification of the issue here involved.

Petitioners contend that their position (taken in their motion to dismiss) that the Federal Commission's accounting authority "is not affected by any accounting requirements prescribed under State law" (R. 40) is consistent with the position assumed in their brief: that they had made no claim to control which would exclude State supervision because they left open "the technical accounting question whether it is factually possible for both federal and state agencies to regulate the fundamental corporate accounts if disparate entries are prescribed" (Pet. Br., p. 39).

To the contrary, we submit that the position assumed by Petitioners in the District Court denied efficacy to the proviso clause in Section 301(a) of the Act. The plain intent of the proviso clause is to remove from the jurisdiction of the Federal Commission any accounts and accounting records which a public utility is required to keep by or under authority of the laws of any State. The Bill of Complaint was not directed to accounts generally, but to certain accounts herein referred to as the official corporate accounts, and Petitioners recognized (in their motion to dismiss) the issue which they would now evade. *State Farm Mutual Auto. Ins. Co.* v. *Duel*, 324 U. S. 154, 159-160 (1945), does not support the proposition to which it is cited at page 40 of Petitioners' brief. That case did not involve conflicting claims of different authorities. The only disparity discussed was in respect of financial requirements or standards imposed in admitting foreign corporations to do busi-

ness within a state. The question was whether, in granting qualification to foreign insurance companies, a state could require that certain standards be met by the company's reserves, computed in a prescribed way which differed from the method usually followed by the company. There was no requirement of disparate entries in the company's corporate accounts, but only a requirement that, in the annual statement specified by the qualification statute, the reserves be computed in a particular way.

The facts recited conclusively show that each Commission asserts and seeks to exercise exclusive control over the Company's official corporate accounts. The contention that any differences between the Commissions "are not now ripe for judicial consideration" (Pet. Br., p. 42) is unwarranted. The case is actual and concrete; the controversy is immediate and irreconcilable; and it admits of immediate and definite determination by declaratory judgment, unlike *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412 (1937). The controversy here clearly is an "actual controversy" as that term is used in the Declaratory Judgment Act. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227 (1937). And the challenged action is "sufficiently imminent and certain to justify the intervention of a court of equity"; *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, 34 (1934).

II

The Questions Raised by the Complaint Can Not be Decided by the Federal Power Commission and Should Have Been Decided by the District Court.

Petitioners assert (Pet. Br., p. 19) that in this proceeding the Company is seeking to obtain in advance of an administrative hearing a judicial determination of some of the issues upon which the Federal Power Commission must necessarily pass and that the decision of the court below is

at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Petitioners further argue that under a statute such as that here involved, the rule requiring exhaustion rests not only upon the principle of "judicial administration" but upon "the specific statutory scheme providing for an administrative determination of all matters in the first instance, prior to judicial review." In support of these contentions, Petitioners rely upon *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946) and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

General Considerations

Prior to the insertion in the enabling acts creating various administrative agencies of comprehensive provisions controlling the manner in which litigants may secure judicial redress from allegedly erroneous action by the administrative agency in question, the courts had developed two doctrines with respect to this matter.[11]

One such doctrine, the "doctrine of prior resort" (also denominated as the "doctrine of exclusive administrative jurisdiction" or the "primary jurisdiction rule"), which is commonly said to have had its inception in *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), is to the effect that it is necessary to resort to the appropriate administrative tribunal prior to going to the courts for relief, in the event of controversies falling within the general area of such tribunal's statutory power. As will be more fully developed later, this doctrine was derived

[11] See Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 Minn. L. Rev. 560 (1941); McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 Calif. L. Rev. 129 (1940); Note, 51 Harvard L. Rev. 1257.

from an interpretation of the various enabling acts. Since Congress had set up an expert administrative body to perform an appointed task, and since it was felt that uniform regulation of the subject matter could be obtained more satisfactorily by the administrative agency than by the courts, it was said that litigants, before coming to the courts, should be required first to resort to the administrative agency.

The second doctrine of general application which was developed in this field is usually denominated as the "doctrine of exhaustion of administrative remedies." Under this doctrine, a litigant is required to exhaust all available administrative remedies before turning to the courts for relief. As will be shown in more detail later, this doctrine, which appears first to have been announced in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210 (1908), is essentially judge-made and is one of judicial self-limitation and self-restraint. It arose out of the desire to extend comity to the administrative agency in question and also was prompted by the desire to insure orderly administrative procedure.

Subsequent to the development of these two doctrines, apparently in order to give the force of statutory law to the prior *practice* of the courts under such doctrines and to prevent undue interference with administrative action by the courts, Congress inserted in certain enabling acts express provisions giving to the administrative agency created thereby exclusive jurisdiction over the subject matter with which it is concerned and providing for exclusive review of the agency's action by designated reviewing courts. For example, the National Labor Relations Act contains provisions of this type. Where such statutory provisions appear, it would seem that the matter is at an end and that there is no occasion to resort to the essentially judge-made doctrines outlined above; see 28 Calif. L. Rev. 129 at 155, *supra*.

Statutory Provisions Not Controlling Here

It may be that Petitioners are arguing that the considerations which are persuasive under statutes like the National Labor Relations Act also are persuasive here. If so, their argument is not well taken, since the Federal Power Act does not provide that the Federal Power Commission's jurisdiction over the subject matter with which it deals is exclusive. The *Myers* and *Waterman* cases, relied upon by Petitioners, are distinguishable on this ground, among others, since in those cases the jurisdiction of the administrative agency involved was made exclusive by statute, whereas that clearly is not true of the Federal Power Commission.

The *Myers* case was a suit in equity to enjoin the National Labor Relations Board from conducting a hearing involving allegedly unfair labor practices. The theory of the complaint was that the plaintiff was not engaged in interstate commerce and for that reason was not subject to the provisions of the Labor Act. In denying the power of the district court to entertain the suit, this Court said:

> "The district court is without jurisdiction to enjoin the hearing because the power 'to prevent any person from engaging in any unfair practice affecting commerce', has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'this power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise' ".

While it is true that the Court in its opinion in the *Myers* case discussed the application and effect of the rule that no one was entitled to judicial relief until he had exhausted his administrative remedy, it is respectfully urged that the language of the Court with respect to the availability of the administrative remedy is dictum. For if, as the Court held, the National Labor Relations Act itself stripped the district court of all jurisdiction with respect to any unfair

labor practice affecting commerce, it is difficult to understand how the district court would have jurisdiction or power to exercise a judicial or legal discretion or to apply a judicial concept.

The same is true of the *Waterman* case, wherein this Court observed, "The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have *exclusive* jurisdiction to decide questions of fact and law, which latter include the issue raised here whether the contracts in question are subject to the Act". (Emphasis supplied).

However, in contending (Pet. Br., p. 19) that the decision of the court below does violence to the exhaustion rule and in asserting that under a statute such as that involved here the rule rests not only upon the principle of "judicial administration" but also upon "the specific statutory scheme providing for an administrative determination of all matters in the first instance", Petitioners may not be making the argument dealt with above but may be arguing that the exhaustion rule is applicable here on the ground (among others) that the method of review prescribed by Section 313(b) of the Federal Power Act (which section is set forth in part in footnote 8 to the opinion of the court below; R. 55) is the only permissible method of review under the Act. If this is Petitioners' contention, that argument was forcefully disposed of by the court below. In that connection, the court below said (R. 55-56, 60-61):

> "This argument is valid of course with reference to orders issued by the federal commission concerning the form of accounts to be kept, concerning accounting practices and procedure, and concerning the disposition of amounts in various numbered accounts, because such orders may be reviewed only in the way the statute permits. It must indeed be admitted to be a valid argument concerning any actual exercise of the federal commission of supervisory control over utility accounting books and records.

"But the argument is not valid here, because it misses the actual point involved. It ignores the fact, which has been pointed out earlier in this opinion, that this case does not have to do with bookkeeping entries or accounting problems as such, and that the complaint in this case does not seek a judicial review of the manner in which the Federal Power Commission has exercised regulatory control over the company's accounting records.

"It is plain, therefore, that the contention of the federal commission to the effect that only its final orders may be reviewed, and then only by the exclusive method of appeal provided by the statute, overlooks the real nature of the controversy as we view it. For, as said before, this appeal is not concerned with the propriety of an actual order of the federal commission concerning the classification or treatment of accounts; it involves only the purely legal problem of determining, after considering together the applicable state and federal statutes, whether the federal commission or the state commission has the exclusive right to control the official accounting records of the company. It is alleged that both commissions claim to have that exclusive right, so this case involves only the search for the proper lodgement of the power of control, and has nothing to do with the manner in which the right of control has been or may be exercised by either commission.

"As we have pointed out heretofore, if the record shows both commissions to be claiming to have the sole power and authority of supervisory and regulatory control over the official accounting records and methods of the company, an actual controversy was presented; and it was the right and duty of the District Court to take cognizance of it for the purpose of construing the statutes of the two sovereignties, and then to say authoritatively which commission, under the harmonized statutes, has the regulatory power which both assert, and which only one can exercise."

* * * * * *

"* * * the basic power of the court certainly includes an interpretation of statutes such as is involved in the

present situation, unless that authority is cut off by the method of review of Federal Power Commission orders afforded by the Power Act. It is our view that the fundamental jurisdiction of the District Court to decide a case such as this, which involves no review of a Commission order, is not affected by the exclusive appellate procedure of the Federal Power Act."

* * * * * *

"This conclusion is not in derogation of the exclusive method of review stipulated in the Federal Power Act, as we have already pointed out. As the federal commission has made no final order, there is nothing from which an appeal could be taken by the company *under the statutory scheme of appeal.*" (Emphasis supplied.)

In summary, the Federal Power Act does not provide that the Federal Power Commission shall have exclusive jurisdiction to interpret the Act or to decide questions of jurisdictional conflict with state authorities arising thereunder. As the court below indicates, this case is wholly beyond the administrative-procedure-plus-review framework of the Federal Power Act and could not have been contemplated by the Congress when the statutory scheme was provided. Hence, the question presented for decision is not controlled by the Act itself or by the *Myers* or *Waterman* cases, *supra.*

Since there is here no controlling statutory provision requiring the legal issues raised by the Complaint to be passed upon exclusively and in the first instance by the Commission rather than the courts and preventing the District Court, rather than the designated reviewing courts, from passing upon them, whether the District Court should have taken jurisdiction to decide those questions must be determined by resort to the judge-made doctrines outlined above, i.e., the doctrine of prior resort and the doctrine of exhaustion of administrative remedies.

Doctrine of Prior Resort

As stated above, the doctrine of prior resort is commonly said to have had its inception in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), *supra*. There a shipper brought suit in the State courts for reparations for allegedly unreasonable rates charged by the railroad company. No prior application for relief had been made by the shipper to the Interstate Commerce Commission. The defense by the railroad was based upon the assertion that the Interstate Commerce Act by implication barred a remedy in the courts until the Commission had first been permitted to pass upon the case. This Court held that the defense was sound, that the need for uniformity in the fixing of railroad rates was paramount, and that such need warranted the Court in construing the Interstate Commerce Act to require by implication that all questions concerning the reasonableness of rates must be submitted to and decided by the Commission in the first instance.

However, where these considerations are not present, the rule is not invoked. In *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), a shipper brought suit in a State court seeking to recover from the railroad company a certain sum alleged to have been exacted in violation of Rule 10 of the carrier's tariff. The shipper contended that the case was within an exception to said Rule. Hence, as this Court pointed out, whether the charge was payable "depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied". In the lower courts the carrier had contended that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction. This Court felt the issue before it to be whether *any court* had jurisdiction of the controversy in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction. In holding that prior resort to

the Interstate Commerce Commission was not necessary, Mr. Justice Brandeis, speaking for the Court, said, at page 291:

"Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but *the character of the controverted question and the nature of the inquiry necessary for its solution.* To determine what rate, rule, or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. *It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.* But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

* * * * *

"* * * *Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion.* The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and *preliminary resort to the Commission was, therefore, unnecessary.*" (Emphasis supplied).

The judgment of the lower courts in favor of the shipper was accordingly affirmed.

For other instances wherein prior resort to the Commission was held unnecessary, see the cases cited in footnote 2 to the Court's opinion in the case just discussed, 259 U. S. at page 295. See also *American Ry. Express Co.* v. *Price Bros.*, (C.C.A. 5th, 1931) 54 F. (2d) 67; compare *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932), *supra.*

Doctrine of Prior Resort Not Applicable Here

In the instant case, the Complaint states a three-way controversy which arises out of conflicting claims of the Federal and State Commissions as to which has the exclusive and paramount authority to regulate the Company's official corporate accounts, sometimes referred to by the Federal Commission as "corporate accounts", "fundamental or basic corporate accounts", "fundamental corporate books of account", or "basic corporate books of account." See *In the Matter of Northern States Power Company, supra.*

The Federal Commission's claim is based upon Section 301(a) of the Federal Power Act and the claim of the State Commission is based upon the proviso clause of that Section and the laws of the State of Arkansas.

Section 301(a) of the Federal Power Act requires public utilities and licensees to keep such accounts and records as the Federal Commission may require for the purposes of its administration, subject to the proviso clause, which modifies this general grant and withholds from the Federal Commission authority over such accounts as a public utility is required to keep under and by authority of the laws of Arkansas. Sections 8(c) and 22(a) (Appendix C to this brief) of the Arkansas Act empower the Arkansas Commission to make reasonable rules pertaining to the account-

ing of public utilities operating in Arkansas, to establish uniform systems of account to be kept by utilities subject to the jurisdiction of the Commission and to prescribe the manner in which public utility accounts shall be kept.

The solution of the conflict between the two Commissions in no respect involves the weighing and balancing of evidence or the exercise of administrative discretion. Neither does it call for technical skill. It involves only the interpretation of Section 301(a) of the Federal Power Act, plus the determining of what the laws of the State of Arkansas require and the reaching of a conclusion as to the effect of such State legislation on the authority of the Federal Commission under the express provisions of the Federal Power Act.

This Court, in *Stark* v. *Wickard*, 321 U. S. 288, 309-310 (1944), held:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. * * * The responsibility of determining the limits of statutory grants of authority in such instances *is a judicial function* entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." (Emphasis supplied.)

This rule was recognized in *Dismuke* v. *United States*, 297 U. S. 167, 172 (1936), where the Court held:

> "But, in the absence of compelling language, resort to the courts to assert a right which the statute creates [recognizes] will be deemed to be curtailed only so far as authority to decide is given to the administrative officer."

This is a clear recognition of the power of the courts and a statement of their responsibility to determine whether an agency is exercising power beyond that fairly granted, as

well as a declaration that such a determination is a judicial —not an administrative—function.

The question is: Which Commission has the authority they both claim? And its complete answer is to be found within the four corners of the Federal Power Act and its legislative history and in the Arkansas statute.

The language of Section 301(a), including the proviso clause, is free from ambiguity and does not call for any construction. If, however, construction is necessary, the intent and purpose of Congress in inserting the proviso clause in that Section, as well as the meaning and effect of such clause, may be clearly established by reference to the Congressional policy underlying the enactment of the amendments to the Federal Power Act which included Section 301(a).

The legislative history of these amendments has been discussed several times by this Court, most recently in *Connecticut Light & Power Company* v. *Federal Power Commission*, 324 U. S. 515, 525-527 (1945) *supra*, where Mr. Justice Jackson, speaking for the Court, said:

> " • • • As frequently is the case, this original bill was drafted by the counsel and aides of the agency concerned. In its support Commissioner Seavey of the Federal Power Commission said to the House Committee, 'The new title II of the act is designed to secure coordination on a regional scale of the Nation's power resources and to fill the gap in the present State regulation of electric utilities. It is conceived entirely as a supplement to, and not as a substitution for, State regulation.' Progress of the bill through various stages shows constant purpose to protect rather than to supervise authority of the states. In reporting a revised bill to the Senate the Committee on Interstate Commerce said, 'Subsection (a) . . . declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory

powers, but not to impair or diminish the powers of any State commission.' The Report of the House Committee on Interstate and Foreign Commerce in presenting the amended bill * * * said:

'The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges . . . The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.'

* * *

"The policy declaration that Federal regulation is 'to extend only to those matters which are not subject to regulation by the States' is one of great generality.[12] It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose. But such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provi-

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[12] See in this connection the following excerpts from the address of Andrew R. McDonald, President of the National Association of Railroad and Utilities Commissioners before the 1935 annual meeting of that Association:

"The [Federal Power] Act contains the provisions, usual in regulatory acts, authorizing the Commission to prescribe accounts to be kept by the utilities subject to regulation. *To guard against the possibility that this power might be exercised to interfere with the keeping of accounts prescribed by State commissions,* we asked for and obtained the inclusion of the following express language in Section 301 (a):

"'*Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State.'

* * * * *

"* * * I have rehearsed these provisions because of the great importance of this Act, and because great concern was felt while the Act was before Congress lest the Act should be passed in such form as to encroach upon State regulation." (Emphasis supplied).

sions which purport to carry out its intent. It cannot wholly be ignored.

> "The declared purpose might also be looked for in specific denials of power to the Commission, such as that found in § 204(f), which provides that its controls, relating to issuance of securities, shall not extend to a public utility operating in a state under the laws of which its securities are regulated by a state commission."

The Company submits that, just as jurisdiction over the issuance of public utility securities is withheld from the Federal Commission when that jurisdiction is exercised by a State Commission, Congress intended to withhold from the Federal Commission regulatory power and authority over all *"accounts", "memoranda"* or *"records"* of a public utility which the laws of a State prescribed or authorized its Commission to prescribe. Here the State of Arkansas and its Commission have prescribed the manner in which the Company must keep its basic *"corporate books, accounts, and records"* and have designated the books so prescribed as its *"official corporate accounts and records"*.

It is self-evident that accounts and records would not and could not be kept *"by or under the authority of the laws of a State"* if the Federal Commission or any other Federal authority has any power or authority to direct, dictate or coerce the making of any entries therein or the disposition of any of the amounts therein established. Therefore the conflict in the case at bar can be resolved only by determining which Commission *under the law* has regulatory control over the accounts in question.

Again we wish to call attention to the fact, which was noted by the court below, that "the complaint does not challenge the correctness of, or justification for, any order of either commission with respect to the manner of recording transactions on the company's books, or the allo-

cation of items among prescribed accounts, or the disposition of amounts recorded in various accounts." (R. 48)

It is respectfully reiterated that the issues in the case at bar are *not issues involving questions of fact or discretion in technical matters, requiring for their solution knowledge commonly found only in a body of experts, but are purely legal questions with which the courts are more competent than the administrative agency to deal, and should be settled by the courts.* Hence there is no necessity here for prior resort to the administrative agency concerned. Incidentally, there certainly is nothing in the legislative history of the Federal Power Act to indicate any Congressional intent that the Federal Commission itself should first pass upon such patently legal questions as are here presented.

Petitioners take the position that the decision of this Court in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 29, 1946, is in effect a holding that the Federal Commission has the power to decide the legal question of what the Arkansas law requires and therefore is controlling here. But the *First Iowa* case, which does not involve the application of the "exhaustion" principle, is so clearly distinguishable from the case at bar that its rule should not even influence, much less control, the decision here. In the *First Iowa* case, this Court held that the State statutes requiring the issuance of a State permit to construct a hydroelectric project, before the Federal Commission could grant a license, were superseded by the Federal Water Power Act. Therefore it was not necessary for the Federal Commission to construe the Iowa statutes, since the State law could not have the effect (as in the case at bar) of conferring upon any State authority jurisdiction sought to be exercised by the Federal Commission.

In the case at bar, however, the situation is entirely different. Here the conflict between the two Commissions as

to which has control over the Company's official corporate accounts cannot be determined, as the conflict was held to be determinable in the *First Iowa* case, by the construction and application of the Federal Act alone. Section 301(a) of the Federal Power Act upon which Petitioners rely as giving them power over the Company's official corporate accounts does not even purport to override or supersede any State law or to strip the States of any of their power over any accounting or accounting records of a public utility. To the contrary, Congress was careful to leave the States unmolested with respect to such accounts and records as they might require a public utility to keep. Therefore, the application and effect of Section 301(a) of the Federal Power Act cannot be determined without first determining what the State law requires.

Doctrine of Exhaustion of Administrative Remedies

It is next necessary to turn to the doctrine of exhaustion of administrative remedies. As stated above, this doctrine appears first to have been announced in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 230, 232 (1908), *supra*. This suit involved a rate order entered by the State Corporation Commission of the State of Virginia. Under the Virginia Constitution, any person aggrieved by such an order had the right to appeal to a State court, and, on such appeal, the State court performed essentially administrative or legislative functions, having the power to substitute for the Commission's order "such order as, in its opinion, the Commission should have made". Without first appealing to the State court, plaintiff brought suit in the Federal courts to enjoin the enforcement of the Commission's order, alleging that the rates fixed thereby were confiscatory. Mr. Justice Holmes, speaking for this Court, posed the question whether "considerations of comity and convenience" did not require the Federal courts to refrain from interfering with State action until the remedies afforded by the State

had been exhausted. This question was thought to be one of "equitable fitness and propriety". The Court said:

> "The state of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is intrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the state, in its final legislative action [in making the rate order], would not respect what they think their rights to be, before resorting to the courts of the United States."

Some question was raised whether, under the Virginia statutes, the time for an appeal to the State court might not have lapsed. In response to this contention, the Court said:

> "* * * As our decision does not go *upon a denial of power* to entertain the bills at the present stage, but *upon our views as to what is the most proper and orderly course in cases of this sort when practicable,* it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed, as brought too late, the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismissed without prejudice and filed again." (Emphasis supplied).

Thus the two primary reasons for the adoption of the rule requiring exhaustion of administrative remedies, as set forth in the case in which the rule first was announced, apparently were the desire to extend comity and to insure orderly administrative procedure, unburdened by undue interference on the part of the courts. The fact that allegedly erroneous administrative action often was attacked

by suits in equity to enjoin such action also undoubtedly had a bearing upon the development of the exhaustion doctrine. If administrative remedies had not been exhausted, it was sometimes said or intimated that there was no showing that the remedy at law was inadequate, and that, if the administrative agency had not acted finally, there might be no threat of irreparable injury. See, for example, *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300 (1937); *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316 (1945).

On whatever ground the doctrine is placed, it seems clear that, in the absence of statutory provisions providing otherwise, it is discretionary with the courts whether to require exhaustion of administrative remedies, since the doctrine, as developed by the courts, is essentially judge-made, springing from judicial self-restraint and self-limitation. See the *Prentis* and *Slattery* cases, *supra*.

Hence, if other considerations are deemed more important than the requirement of exhaustion, the rule will not be invoked. See, for example, *Oklahoma Natural Gas Company* v. *Russell*, 261 U. S. 290, 293 (1923). In that case, plaintiffs' application to the State Corporation Commission for higher rates had been denied. As in the *Prentis* case, the State Constitution gave an appeal to the Supreme Court of the State, which court had power both to substitute an order different from that entered by the commission and to grant a supersedeas in the meanwhile. Appeals were taken to the State court and supersedeas was applied for but refused. After supersedeas was denied by the State court, suit was brought in the Federal courts seeking to enjoin the action of the Commission in denying the application for increased rates. Applications for temporary injunctions were denied on the authority of the *Prentis* case. On appeal to this Court, Mr. Justice Holmes said:

> "If the supreme court of the state hereafter shall change the rate, even nunc pro tunc, the plaintiffs will have no adequate remedy for what they may have lost

before the court shall have acted. * * * In such a state of facts, Prentis v. Atlantic Coast Line Co. has no application. See Love v. Atchison, T. & S. F. R. Co., 107 C. C. A. 403, 185 Fed. 321, 324, 325. *Rules of comity or convenience must give way to constitutional rights.*

* * * * *

"As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has as yet not been considered, the cases should be remanded to that court, with directions to proceed to the trial." (Emphasis supplied).

For other cases similar to the *Russell* case, see *Pacific Telephone & Telegraph Co.* v. *Kuykendall,* 265 U. S. 206 (1924); *Mountain States Power Co.* v. *Public Service Commission,* 299 U. S. 167 (1936); compare *Porter* v. *Investor's Syndicate,* 286 U. S. 461 (1932).

Doctrine of Exhaustion of Administrative Remedies Should Not Be Applied

The doctrine of exhaustion of administrative remedies should not be applied in the instant case. As has been pointed out, in the absence of statutory provisions controlling the matter, whether this doctrine should be applied rests in the sound discretion of the courts. And, in the instant case, it is respectfully urged that the exhaustion principle should not be applied; to the contrary, if the District Court's discretion had been properly exercised, the relief asked would have been granted. Here again, the *Myers* and *Waterman* cases, upon which Petitioners rely so heavily, are distinguishable from the case at bar. In those cases, even if statutory provisions had not been controlling, there probably was reason for the application of the exhaustion doctrine. In the first place, those cases involved factual questions within the technical competence of the administrative agencies concerned, while in the instant case no factual determination is required to settle the conflict pre-

sented. Secondly, the questions involved in those cases were merely ones of a proper and desirable allocation of power between *court* and *commission*. Here the issue is the proper allocation of power by the court between *commission* and *commission*, with the Company (a) left uncertain by the Federal Commission's deliberate failure to resolve the conflict, (b) at a loss as to its proper course of action from day to day, (c) subject to certain criminal sanctions, and (d) faced with the necessity of going into a burdensome hearing in which its position will be uncertain. The Company would obviously be at a disadvantage during any hearing before the Federal Commission if at that time the conflicting claims as to jurisdiction were not settled. While these considerations may not be controlling, they should have moved the District Court, in the exercise of its sound discretion, to settle the legal question and resolve the dilemma, especially since there was no impelling reason why it should not have taken jurisdiction to decide the matter. Since the question presented for decision is not one requiring for its solution informed, expert, administrative knowledge or the exercise of administrative discretion, the District Court should not have considered that it was "intruding" upon the administrative province on this score. Further, the fact that a court, rather than the Federal Commission, decides the issue will not interfere with effective regulation. The fact that a court takes jurisdiction to settle the matter will not lead to lack of uniformity of treatment over the subject matter; on the contrary, an authoritative determination of the question at this time will resolve doubts in the administration of the Federal Power Act, and the Act, as so interpreted, will be equally applicable to all litigants standing in the same position as the Company. Hence, there is no reason why the District Court should not have taken jurisdiction to decide the issues raised by the Complaint. Rather, in view of the impossible position in which the Company finds itself, there is every reason why such jurisdiction should have been entertained.

In short, since in this case there is no statutory inhibition against court action, and since the rule requiring exhaustion is one of discretion based on judicial self-restraint which is not appropriate here, considerations of comity and orderly administrative procedure should give way so that the serious dilemma in which the Company finds itself may be resolved. Thus the District Court should have taken jurisdiction to settle the questions involved.[13]

Administrative Remedy Afforded by Act Inadequate

As indicated above, due to the fact that suits in equity were often brought to enjoin administrative action, it was sometimes said that unless the plaintiff had exhausted his administrative remedies there was no showing that there was an inadequate remedy at law and hence failure to exhaust administrative remedies was felt to be a bar to the relief sought. This reasoning, however, has no place in a declaratory judgment proceeding. As stated by Professor Borchard in his work on Declaratory Judgments (2nd Ed., 1941), pp. 341, 342:

> "To conceive of the declaratory judgment as if it were an extraordinary remedy, or even an equitable remedy like injunction, not grantable when an ordinary or legal remedy is available, involves serious error. It is not supported by history or sound precedent, and its perpetuation by further decisions would impair the valuable social functions which the declaratory judgment was designed to perform. It allows improper technicalities to defeat the administration of justice."

However, even if it is said that a declaratory judgment is not grantable if an adequate administrative remedy is available, that rule or supposed rule does not operate to bar relief here. The only administrative remedy pointed

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[13] The Attorneys General, in their brief *amici curiae*, present further arguments why the exhaustion doctrine is not applicable here and why the *Myers* and *Waterman* cases are distinguishable from the case at bar.

out by Petitioners as being available to the Company is that afforded by the Federal Power Act. The inadequacy of this remedy in the present situation has already been indicated. Further, the Federal Commission (a) has not been empowered to construe and determine the requirements of the Arkansas law, (b) has not been empowered to restrain the State Commission from prosecuting the Company, as it has threatened to do, if it (the State Commission) has the authority it asserts and has exercised over the Company's accounting records, (c) does not have jurisdiction over all necessary parties in that it can not restrain or otherwise bind the State Commission and (d) did not constitute a proper forum in that the Company could not make the State Commission a party, nor could the latter intervene as a matter of right.

Petitioners (Pet. Br., p. 27) cite various cases in support of their theory that the States are bound by administrative procedure provided by the Congress and are required to follow it to the same extent as private litigants. But the cases relied upon (with the possible exception of one, which will be discussed later) did not involve a contest between a State and a Federal agency over the right of the State to exercise a sovereign power expressly recognized and confirmed in the State by the Congress.

The possible exception noted is the case of *Wisconsin Public Service Commission* v. *Federal Power Commission* (C.C.A. 7th, 1945), 147 Fed. (2d) 743. This was a proceeding for the issuance of a license under the Federal Power Act. The Wisconsin Commission intervened and contended that the stream upon which the project was to be constructed was not navigable and that, therefore, the Federal Commission had no jurisdiction. That case, unlike that at bar, involved a factual determination with respect to the navigability of the stream under consideration and for that reason clearly is distinguishable.

While the Federal Power Act provides that States and their agencies may complain to the Federal Commission, that provision has reference to complaints respecting derelictions of a public utility and does not contemplate that a State or its agency must first complain to the Federal Commission and there obtain a determination with respect to the Federal Commission's usurpation and exercise of powers conferred upon the State.

As disclosed by its Complaint, the Company is willing to follow either of the Commissions. Thus the litigation has, in effect, become a contest between the Federal and State Commissions as to which possesses the power they both claim, but which only one may exercise. It is respectfully submitted that the scheme of regulation and administrative procedure incorporated by the Congress in the Federal Power Act certainly does not afford an adequate and sufficient remedy for the solution of the conflicting claims of the two warring Commissions. Indeed, we repeat that this controversy obviously was not contemplated by, and is clearly beyond, the entire procedural scheme of the Federal Power Act.

Furthermore, a tribunal, although it may have jurisdiction of the subject matter, must also have jurisdiction of the parties to be affected by its order or judgment.

And the Federal Power Act and the rules of the Federal Commission provide no way whereby the Company could force the State Commission into the proceedings pending before the Federal Commission. The only way the State Commission could be made a party to the proceedings before the Federal Commission so as to become bound by its order was by voluntary intervention. The State Commission, under Section 1.31, page 3 of the Federal Power Commission's Rules of Practice and Regulation in effect at the time, could not intervene as a matter of right. Under this rule, it was discretionary with the Federal Commission

whether it would permit the intervention of any party, including a State, in proceedings before it.

Since this cause was dismissed by the District Court, the Federal Commission has amended the rule indicated, by giving to States and State agencies, as a matter of right, the privilege of intervention. This fact, however, cannot change the situation as it existed when the District Court dismissed the cause.

The rule seems to be well settled that a remedy "cannot be adequate if its adequacy depends upon the will of the opposing party." *Bank of Kentucky* v. *Stone* (C. C., D. Ky., 1898) 88 Fed. 383, 391. This language was quoted and approved by this Court in *American Life Insurance Company* v. *Stewart*, 300 U. S. 203, 215 (1937).

In the case of *Fredenberg* v. *Whitney* (D. C., W. D. Wash., 1917) 240 Fed. 819, 823, it was said:

> "In these days of industrial expansion, parties should have a right to have any issue which involves their financial status speedily adjusted, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the party himself controls and can assert at the moment."

In this cause the Company has two adversaries—the Federal Commission and the State Commission. It rested wholly within the discretion of the State Commission whether it would intervene in the proceedings before the Federal Commission and it rested wholly within the discretion of that Commission whether it would permit the State Commission to intervene. Thus any remedy or relief which the Federal Power Act afforded the Company was entirely within the control of the Company's adversaries.

The Federal Power Act, under the circumstances disclosed by the record, does not afford the Company *any*, much less an adequate, remedy for the settlement of the

controversy here presented and the granting of the relief here sought.

In an effort to escape the legal issue here presented as to which Commission has control of the official corporate accounts of the Company, Petitioners suggest, if they do not actually urge, that if the Federal Commission is permitted to proceed with its hearing it might find a way of reconciling the conflict between the two Commissions and of recording disparate entries upon the same accounting records (Pet. Br., p. 22). It is also suggested that the issue presented may be avoided if the Federal Commission can work out a practicable method of accommodating the demands of the two agencies (Pet. Br., p. 27). These statements clearly imply that the two Commissions might reach an accord as to their conflicting claims and that the issues presented are factual, calling for an exercise of administrative discretion, rather than legal and thus calling for an exercise of the judicial function.

In making these statements, Petitioners are not only indulging in speculation, but are attempting to convert the issue presented for determination from one of law to one of fact.

In the first place, the record discloses that an attempt to settle the issue between the two Commissions by conference and negotiation has already resulted in failure (See paragraph (c) of show cause order, Pet. Br., p. 66). Second, the issue presented is not the reconciling of conflicting accounting entries, but is a legal conflict over which Commission, under the law, has exclusive control of the Company's official corporate accounts. Third, the Petitioners have taken the position in their brief that the Federal Power Act gives the Federal Commission exclusive jurisdiction over the records in question. But the State Commission has just as definitely taken the position that the law gives it exclusive control over the same records.

The law does not confer dual authority over those accounts of the Company which are kept under authority of state law or require the two Commissions to work out a method of dual control. If they were to attempt thus to accommodate their disparate demands, one or the other would surrender statutory authority in violation of law and the rights of the Company. The two Commissions can not work out any lawful agreement whereby one will give up authority conferred upon it by statute and defer the exercise of that authority so surrendered to the other Commission, upon which such authority was *not* conferred by statute. Neither Commission has the power to surrender its lawfully conferred authority to the other. Such an arrangement, in addition to being unlawful, would leave the Company in the most serious dilemma. It could not make an entry in its official corporate accounts with any assurance whatever that it would not be violating the law. Such an agreement between the two Commissions would not be binding and might be reversed whenever the personnel of either Commission changed.

On page 26 of their brief, Petitioners in effect say that this Court in the *Northwestern Electric Company* case, *supra*, held that the Federal Commission has the exclusive jurisdiction now claimed by both Commissions. This contention is made notwithstanding the fact that, in the *Northwestern* case, the Court did not discuss or determine the force and effect of the proviso clause of Section 301(a) of the Federal Power Act. But it is tantamount to a declaration by Petitioners that Congress has charged the Federal Commission with the duty of regulating the accounts in question. To reach the conclusion that the State Commission had the exclusive power both Commissions claim would, under the Federal Commission's interpretation of the *Northwestern* decision, be a failure on its part to carry out a mandate of Congress.

To say the least, the position taken by Petitioners forecloses any possibility whatever that the Federal Commission might conceivably hold with the State Commission. Indeed, the mere assertion of such a possibility goes beyond the speculation sometimes sanctioned in argument.

III

The Federal Declaratory Judgment Act Provides the Appropriate Remedy for the Relief Sought By the Complaint

The pertinent part of the Federal Declaratory Judgment Act reads as follows: (the full Act is found in Appendix A to this brief).

> "(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

The Declaratory Judgment Act is an important development in procedural law and should be liberally construed, *Maryland Casualty Co.* v. *Boyle Const. Co.* (C.C.A. 4th, 1941), 123 F. (2d) 558, 565. The statute must be liberally construed to attain its objective, which is to expedite and simplify the ascertainment of uncertain rights, *Ohio Casualty Ins. Co.* v. *Marr* (C.C.A. 10th, 1938) 98 F. (2d) 973, 975.

In providing the remedy of a declaratory judgment, it was the Congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him

an early adjudication without waiting until his adversary should see fit to begin suit, *Dewey & Almy Chemical Co.* v. *American Anode Inc.* (C.C.A. 3rd, 1943) 137 F. (2d) 68, 69. The trend of cases dealing with declaratory judgments is to extend their benefit to parties whose interests are challenged or are in jeopardy even before a right of action exists or a cause of action accrues. The Declaratory Judgment Act is procedural and its purpose is to adjust controversies which are *in esse* but not actually crystallized in litigation. *Ohio Casualty Ins. Co.* v. *Maloney* (D.C., E.D. Pa., 1942), 44 F. Supp. 312, 314.

In *Purcell* v. *Summers* (C.C.A. 4th, 1942) 126 F. (2d) 390, 394, the circuit court dealt with an application under the Declaratory Judgment Act for a judgment declaring the legality of the union of several branches of the Methodist Church and the propriety of granting relief under the statute. The court said: "The federal courts represent the sovereignty to which all of the parties to the controversies owe allegiance, which is not true of any state court that might be selected; and the broad power of the federal courts with respect to declaratory judgments is especially suited to the settlement of a controversy of this character between Christian people, who are seeking, not strife, but a final adjudication of rights by which they may abide. The declaratory judgment will expeditiously determine a fact or status 'on which a whole complex of rights may depend'. It will remove uncertainty and insecurity from the legal relations involved and thus 'clarify, quiet and stabilize them before irretrievable acts have been undertaken'," citing Borchard, Declaratory Judgments (2d Ed., 1941), pp. 283-284. See also *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local #123,* (C.C.A. 5th, 1943), 137 F. (2d) 176, 179, affirmed 321 U. S. 590 (1944).

In *Mississippi Power & Light Co.* v. *City of Jackson* (C.C.A. 2d, 1941) 116 F. (2d) 924, 925, the circuit court, discussing the remedy provided by the Declaratory Judgment

Act, said: "While the declaratory judgment act has not added to the jurisdiction of the federal courts, it has added a greatly valuable procedure of a highly remedial nature. Extending by its terms to all cases of actual controversy 'except with respect to Federal taxes', it should be, and it has been given a liberal construction and application to give it full effect. *Currin* v. *Wallace*, 306 U. S. 1 * * * presents a striking instance of its use in a suit between tobacco warehousemen, auctioneers and the Secretary of Agriculture, to determine the constitutionality and effect of the Tobacco Act of August 23, 1935, 7 USCA 511, et seq."

Many other citations might be offered giving the courts' views of the purpose, construction and application of the Federal Declaratory Judgment Act, but to do so would unduly extend this brief. It is urged again that the Federal Declaratory Judgment Act is highly remedial and should receive construction and application by the courts in keeping with the intent of Congress in enacting it, which was to enable parties having a real controversy to settle the same before blood is shed, damages have accrued or penalties have attached.

Uncertainty as to Jurisdiction Affects Company's Rights

The uncertainty as to which Commission has jurisdiction over the Company's official corporate accounts unquestionably will affect the course of the hearing before the Federal Commission, when that hearing is held. If the adjustments ordered by that Commission are not to be recorded upon the Company's official corporate accounts, its course will no doubt be different from what it would be if they are to be so recorded. Until the Company knows who its accounting master is, it must be careful not to do, or propose to do, anything which might violate the State Commission's order. In a hearing before the Federal Commission, the Company cannot lose sight of the fact that the State Com-

mission has threatened to prosecute it if that Commission's orders are violated. The Company cannot have as free a hand in the presentation of its cause before the Federal Commission as it would have if it knew who had control of its accounting records. On the other hand, if the State Commission does not have the jurisdiction claimed by it, the Company will be free fully to develop its case before the Federal Commission without regard to what the State Commission may have done or threatens to do. The Company has the "right to raise the issue as to whether [its] conduct does or does not violate the criminal law and affect [its] property rights [and] is not required to wait indefinitely under suspension, • • • " *Sunshine Mining Co.* v. *Carver* (D. C., N. D. Idaho, 1941), 41 F. Supp. 60.

As this Court said in *Terrace* v. *Thompson*, 263 U. S. 197, 216 (1923), "They [parties] are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights."

Furthermore, as the court below held:

> "Existence of another route to the same goal does not preclude a litigant from invoking the Declaratory Judgment Act" (R. 62). See particularly the authorities collected in Note 19 of the Court's opinion (R. 62).

Among the authorities cited by the court below is Rule 57, Federal Rules of Civil Procedure. (28 USC following Section 723(c)). This rule in part reads, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate". This rule has been construed and applied in a number of cases. See *Delno* v. *Market St. Ry. Co.* (C. C. A., 9th, 1942), 124 F. (2d) 965, 968; *Dominion Electrical Mfg. Co.* v. *Wiegand* (C. C. A. 6th, 1942), 126 F. (2d) 172, 173; *Employers' Liability Assur. Corp. Ltd.* v. *Ryan* (C. C. A. 6th, 1942), 109 F. (2d) 690.

In *Chicago Metallic Mfg. Co.* v. *Edward Katzinger Co.* (C. C. A. 7th, 1941) 123 F. (2d) 518, 519, the Circuit Court held, "While it is true that granting of the remedy [a declaratory judgment] is discretionary with the court and may be refused if it is being sought merely to determine issues involved in a case already pending, the mere pendency however, of another suit between the parties without more, is no basis for refusing a declaration. *Columbian Nat. Life Ins. Co.* v. *Foulke*, 8 Cir., 89 F. (2d) 261 and *Maryland Casualty Co.* v. *Consumers Finance Service*, 3 Cir., 101 F. (2d) 514. 'It is only where the court believes that more effective relief can and should be obtained by another procedure and for that reason a declaration will not serve a useful purpose, that it is justified in refusing a declaration because of the availability of another remedy.' Borchard, Declaratory Judgments, 1934, p. 110."

The foregoing authorities, together with those cited in note 19 of the opinion of the Court of Appeals, are clearly to the effect that a District Court may not refuse relief under the Declaratory Judgment Act merely because of the pendency of another suit or the availability of another remedy. Especially is that true when, as here, (a) the adequacy of the other remedy is questionable, (b) the power of the other tribunal to pass upon the issues involved is uncertain, (c) it appears that full and complete relief may not be granted, or (d) the relief offered by the other remedy may not settle all of the issues involved.

Conclusion

In conclusion, the Company respectfully submits:

(1) That the District Court had jurisdiction of the subject matter of the Complaint and should have granted the relief sought by answering a legal question, i.e., which of the two Commissions has jurisdiction over the Company's official corporate accounts?;

(2) That the failure of the Company to exhaust a supposed or assumed administrative remedy did not justify the District Court in refusing to grant the relief sought, particularly since the Federal Power Act itself did not afford the Company an adequate and sufficient remedy for the settlement of the irreconcilable controversy between the two Commissions;

(3) That, as the Court of Appeals held, "the present case presents an unusually appropriate opportunity for the exercise of the judicial function in the manner contemplated by the Congress when it enacted the Declaratory Judgment statute."; and

(4) That the judgment of the Court of Appeals remanding the cause to the District Court for further proceedings in conformity with the opinion of the said Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Declaratory Judgment Act

(49 Stat. 1027, Judicial Code, § 274(d), 28 U.S.C.A. 400).

(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, c. 231, § 274d, as added June 14, 1934, c. 512, 48 Stat. 955, and amended Aug. 30, 1935, c. 829, § 405, 49 Stat. 1027.)

APPENDIX B

Excerpts From the Federal Power Act

(49 Stat. 847, 854, 16 U.S.C.A. §§ 824, 825.)

§ 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution

to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. (16 U.S.C.A. § 824(a).)

§ 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof. (16 U.S.C.A., § 825(a).) (Emphasis supplied.)

§ 313. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of

the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). (16 U.S.C.A., §825 *l*.)

§ 315. (a) Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this Act or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this Act, or to appear by an officer or agent at any hearing or investigation in response to a subpoena issued under this Act, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this Act but such forfeiture shall be in addition to any such penalty. (16 U.S.C.A., § 825n (a).)

§ 316. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, or any rule or regulation imposed by the Secre-

tary of War under authority of Part I of this Act shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. (16 U.S.C.A., § 825o.)

APPENDIX C

Excerpts From Act 324 of the General Assembly of Arkansas (1935)

(Pope's Digest of the Statutes of Arkansas, §§ 2071, 2085, 2121, 2122.)

§ 8. (a) The Department herein created is hereby vested with the power and jurisdiction, and it is hereby made its duty to supervise and regulate every public utility in this Act defined, and to do all things, whether herein specifically designated, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

(c) The Department is hereby empowered, after hearing and upon notice, to make, and from time to time, in like manner, alter or amend such reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and of the practice and procedure governing all investigations by, and hearings and proceedings before the Department, as it may deem proper and not inconsistent with this Act.

§ 22(a). The Department, by order, may establish uniform system of accounts to be kept by any public utility subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and the Department may prescribe the manner in which such accounts shall be kept.

§ 61. (a) Every public utility, and every person, or corporation, shall obey and comply with each and every requirement of this Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in the matters herein specified, or any other matter in any way relating to or affecting the business of any public utility, and shall do everything necessary or proper in order to secure compliance with, and observance of, every such order, decision, direction, rule or regulation by all officers, agents, and employees of every public utility.

(b) Any person or corporation which violates any provision of this Act or fails to comply with every lawful order, decision, direction, rule or regulation made or prescribed by the Department, or any part or provision thereof, shall be deemed guilty of a misdemeanor and upon conviction, subject to a penalty of not less than $100 nor more than $1,000 for each such offense.

§ 62. Each violation of any of the provisions of this Act or of any lawful order or rule of the Department, or any part or portion thereof by any corporation or person, is a separate and distinct offense, and in case of a continuing violation after a first conviction each day's continuance thereof shall be deemed to be a separate and distinct offense.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

FEDERAL POWER COMMISSION, ET AL. ..... *Petitioners*

v. No. 543

ARKANSAS POWER & LIGHT COMPANY ..... *Respondent*

MOTION OF AMICUS CURIAE TO TRANSFER FROM THE SUMMARY TO THE REGULAR DOCKET AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT UPON SUBMISSION OF THE CAUSE

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Comes Guy E. Williams, Attorney General of the State of Arkansas, and on behalf of the State as *Amicus Curiae* herein moves the Court to transfer this cause from the summary to the regular docket and that the movant be granted leave to participate in the oral argument upon the submission of this cause and in support of this motion shows to the Court:

1. Upon granting *certiorari*, the Court, upon the theory that the issues involved herein did not justify extended argument, assigned the cause to a summary docket. In cases upon this docket only one-half hour on a side is allowed for argument, and only one counsel will be heard on the same side. With due deference, the theory of the Court for assigning the cause to its summary docket is erroneous as it will hereafter appear. The issue presented and which must be determined presents a serious jurisdictional question—an exclusive judicial question—a question of first impression which affects the sovereign rights of all of the states of this nation and involves their dignity as sovereigns, and, therefore, merits an extended argument and a most careful investigation and consideration by this Court.

2. Believing that the issues presented here were of vital interest to the States of this nation, and especially to the State of Arkansas, the State of Arkansas and some twenty or twenty-five other States of this nation, acting through their respective Attorneys General have, under the liberal rules of this Court, filed a brief *amici curiae* pointing out and emphasizing the interest of the States in this litigation, insisting that the action of the Court below should be affirmed.

3. The principal issue to be determined herein is the jurisdiction of the District Court for the District of Columbia to entertain a suit involving conflicting claims of the petitioners, the Federal Power Commission and its members, and of the Arkansas Public Service Commission and its members, with respect to which Commission has exclusive regulatory power and authority over the same subject matter, the official corporate accounts of the Respondent, a public utility incorporated under the laws of the

State of Arkansas and therein exclusively engaged in generating, purchasing, transmitting and selling electric energy to consumers and to others at wholesale for resale.

4. Petitioners' claim of exclusive jurisdiction is based upon Section 301(a) of the Federal Power Act (16 U.S.C.A. Sec. 825). This section gives the Federal Commission jurisdiction over certain accounting records of a public utility. It, however, by reason of a proviso clause, withholds from the Federal Commission regulatory power and jurisdiction over any accounting records of a public utility which are required to be kept by and under the authority of the laws of any State. The Arkansas Commission's claim of exclusive jurisdiction is based upon said proviso clause and statutes of the State of Arkansas.

5. The litigation, upon its merits, involves a controversy between the two Commissions, a clash of asserted sovereign rights and powers.

6. The principal contention and argument of the Federal Commission is not that the District Court does not have jurisdiction of the subject matter of this suit, but that it should decline to exercise that jurisdiction because of the failure of the Respondent and the State Commission to exhaust their so-called administrative remedy. So far as the State Commission is concerned, the Federal Commission's argument is that it should intervene in a proceeding then pending before the Federal Commission involving the accounts and the accounting of the Respondent, and should there assert and defend its claim of exclusive jurisdiction; that, in effect, the State of Arkansas, acting through its State Commission, has no standing in the District Court to contest with the Federal Commission its claim of exclusive jurisdiction of Respondent's official

corporate accounting records, but must submit that claim first to the Federal Commission, an administrative agency.

7. The movant, with due deference, submits that aside from being novel, such procedure has never been enforced against a State or an agency thereof asserting or defending sovereign rights and powers against the encroachment by a bureau of the Federal Government.

Wherefore, the movant prays that this cause be transferred from the summary to the regular docket of the Court, and that he, as *amicus curiae,* be granted leave to participate in oral argument upon submission of this cause.

Respectfully submitted

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BRIEF FOR THE STATES AS *AMICI CURIAE*

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FEDERAL POWER COMMISSION, ET AL. ..... *Petitioners*

v. No. 543

ARKANSAS POWER & LIGHT COMPANY ..... *Respondent*

BRIEF FOR THE STATES AS *AMICI CURIAE*

STATEMENT

Believing that the question here involved and which must necessarily be decided affects not only the State of Arkansas, but all of the States of this nation, this brief is submitted by several of the States pursuant to permission granted by Rule 27 (9) of the Rules of this Court, for the purpose of pointing out and emphasizing the interest of the State of Arkansas and other States in this litigation and the position to which they will be relegated, if the contention of the petitioners (hereinafter referred to as Federal Commission) were sustained.

While the State of Arkansas is itself not a party to this litigation, one of its agencies is, the Arkansas Public Service Commission (hereinafter referred to as the State Commission).

The only question decided by the court below, and therefore, the only question which may be considered here, was that of jurisdiction of the District Court to entertain a suit involving a three-way controversy growing out of conflicting claims of the Federal Commission and of the Arkansas Commission, whereby each authority claims and asserts exclusive regulatory power over what the court below calls the official corporate accounts (R.50) of the Respondent, a public utility incorporated under the laws of Arkansas, and therein engaged in the business of generating, distributing and selling electric energy to consumers and at wholesale to others for resale.

The Respondent is subject to the jurisdiction of the Federal Commission and of the State Commission to the extent respectively provided by Part II of the Federal Power Act (49 Stat. 847, 16 U. S. C. A. 824) and by Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935, which conferred comprehensive jurisdiction on the State Commission.

The Federal Commission's claim of exclusive jurisdiction is based upon Section 301(a) of the Federal Power Act (16 U. S. C. A. Sec. 825). This section gives the Federal Power Commission jurisdiction over certain accounting records of a public utility. It, however, contains a *proviso clause* which withholds from the Federal Commission regulatory power and jurisdiction over any accounting records of a public utility which are required to

be kept by and under authority of the laws of any State. Therefore, the Arkansas Commission's claim of exclusive jurisdiction is based upon the proviso clause of said Section 301(a) and the statutes of the State of Arkansas above referred to.

The principal, if not the sole, contention of the Federal Commission is that the State authority, although asserting, as to an Arkansas corporation, sovereign power expressly delegated to the State Commission by the State of Arkansas, must submit its claim of exclusive jurisdiction over said corporation's accounts to the Federal Commission, and let that agency itself decide the validity of the State's claim.

It is readily apparent that if the contention of the Federal Commission is sustained, the several States, in every instance, where there is a jurisdictional conflict between one of their agencies and a Federal Agency, would be required to submit the validity of their claim of power and authority to the Federal Agency, which disputes the very existence of such power and authority, and that the States and their agencies cannot assert, or even defend claims to sovereign power in the courts, unless and until a mere Administrative Agency has decided the question.

We will not detail the facts and circumstances out of which this litigation arose. To do so would be a repetition of a portion of the brief of the litigants and needlessly increase the labors of the Court.

BRIEF

Interest of the State of Arkansas in This Litigation

Because of the conflicting claims of the two Commissions, the Respondent apparently did not know which to follow. If it followed either, it would obviously run the risk of subjecting itself to the statutory penalties prescribed for not having followed the other and recognized that it must comply with the orders of one or the other, but could not comply with orders of both. Respondent has asserted that it was, and is, willing to keep separate accounts for the benefit and information of the Federal Commission. However, this arrangement was not acceptable, because each Commission asserts the right to require Respondent to keep its official corporate accounts in the manner prescribed by it.

Respondent's position was in 'No Man's Land', so to speak, between the cross fire of the two Commissions. It, therefore, brought this suit for the purpose of securing a judicial declaration as to which Commission it had to obey, and at the same time to provide an appropriate forum in which the two Commissions might contest and settle their conflicting claims. It, therefore, is apparent that this litigation, on its merits, involves a controversy between the two Commissions with respect to which has the exclusive right to supervise and regulate the keeping of Respondent's official corporate accounts, which right both Commissions claim, but which only one may exert. It thus appears that this controversy involves a clash of asserted sovereign rights and power.

The solution of these conflicting claims involves *only* the construction and harmonizing of the statutes of two sovereignties—the Federal Government and the State of Arkansas. Therefore, the State of Arkansas has a direct and vital interest in any decision which may be rendered in this litigation on its merits.

Furthermore, the State is intensely interested in the jurisdictional question now before the Court. The Federal Commission contended in the court below, in its brief upon *certiorari*, and no doubt will again contend, that the District Court has no jurisdiction to entertain this suit and to determine the legal effect of the Arkansas regulatory statute when considered in connection with the related Federal Power Act. In support of this contention the Federal Commission, in effect, argues that the State, through the State Commission, must intervene in the proceedings pending before the Federal Commission involving the accounts of the Respondent and there assert its claim and exhaust its so-called administrative remedy; and if the State is dissatisfied with the decision of that Commission, it must seek a review before an appropriate Circuit Court of Appeals.

Such procedure, aside from being novel, has never been enforced against a State or an agency thereof asserting or defending sovereign rights and powers against encroachment by a bureau of the Federal Government. The argument belittles the dignity and sovereignty, not only of Arkansas, but of every State of this Nation. It lowers a State to the same plane as the private corporation. It weakens the ties which have held the Federal system together, and, if upheld, it would strip the States of a

right which tradition has made sacred—the right to defend in the National Courts and there to assert their claim of sovereign power and authority.

The District Court Has Jurisdiction

In support of its contention, the Federal Commission does not point out or refer to any language of the Federal Power Act or any other Act of Congress making mandatory the procedure indicated, or which even tends to deprive the District Court of any jurisdiction conferred by the general and broad grant of jurisdiction made by Section 24 of the Judicial Code (28 U. S. C. A. Sec. 41).

In passing, it is respectfully insisted that if the Congress, by the enactment of the Federal Power Act, had intended to require a State to assert or defend before the Federal Commission a claim of sovereign rights and power to regulate and supervise the official accounting records of one of its own corporations, and to close the doors of the Federal Courts to the State until after that Commission had first passed on the question, it could, and would, have used language expressly so providing. Not having done so, with due deference, it is insisted that the Court should not impute such intention to Congress or read into the Act any such requirement.

Apparently, the Federal Commission, for support of its contention, principally relies upon a rule of expediency adopted by the courts, not because of their lack of jurisdiction to hear and determine the issues, but out of deference to the expeditious hearing and conclusion of administrative proceedings. This rule requires that, in appropriate cases, a party must exhaust its administrative remedy before resorting to the courts. In support of its

application of the rule here, the Federal Commission cites several cases from this Court. Those principally relied upon are *Myers* v. *Bethlehem Shipbuilding Company,* 303 U. S. 41 (1938), and *Macauley* v. *Waterman Steamship Corporation* No. 435, October Term 1945, decided March 25, 1946. It is respectfully submitted that the opinions in those cases are clearly distinguishable from and have no application to the circumstances in the case at bar, and are, therefore, neither controlling or persuasive.

It is true that in both of those cases the Court held that a party could not resort to the District Court for a declaration that an Administrative Act did not comprehend particular activities of a party. In those cases, however, the jurisdiction of the administrative agency and the coverage of the Administrative Act could not be determined from the statutes alone, but could only be ascertained from facts as to the nature and character of the activities and operations of the parties and the contracts executed by them. In those cases no State or State Agency was disputing the right of a Federal Agency to regulate the particular businesses involved; and no State or State Agency was present there insisting and claiming that it had, under the express language of the Act of Congress and the statutes of the State, the exclusive power and authority to regulate the objects or activities which the Federal Agencies were undertaking to regulate. In those cases the construction and effect of State statutes were not involved, while here any tribunal undertaking to solve the conflicting claims of the two Commissions is confronted with the necessity of determining what the state law requires.

The distinction between those cases and the one here cannot be more cogently stated and their inapplication here more clearly expressed than to quote the language of Mr. Justice Miller, speaking for the court below with respect to the *Macauley* case. He said: "This argument overlooks the fundamental fact that something more is at stake here than merely to gauge the sweep of the federal statute. For it is one thing for a federal administrative agency to rule as to the coverage of its own act when that act stands alone. It is quite another for the agency to decide whether its organic act overrides the statute of a different sovereignty which already has been applied by the state authorities to the situation which the agency desires to control by applying the federal act. That is a task for the courts. We do not understand the *Macauley* case as extending to a federal agency the unprecedented power of exercising such a clearly judicial function" (Note 17; R.62).

Rule of Expediency Should Not Be Applied

However, even if it be assumed that the principles of the *Myer* and *Macauley* cases should be applied in cases which require no factual determinations, there are other cogent reasons why the rule of expediency, requiring resort to and exhaustion of the administrative remedy, should not be applied in the case at bar.

As heretofore pointed out the rule requiring the exhaustion of administrative remedies before resorting to the courts for relief is a rule of expediency adopted by the courts for the purpose of expediting administrative procedure. It in no wise affects the jurisdiction of the courts. It merely brings into play a judicial discretion

through the exercise of which a court may either retain or decline jurisdiction of a cause. *City of El Paso* v. *Texas Cities Gas Co.*, 100 F. (2d) 501, 503; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274. The exercise of judicial discretion presupposes jurisdiction of the cause. *Maryland Casualty* v. *United Corporation*, 111 F. (2d) 443-445 (1st Cir., 1940); *Murray* v. *City of Pocatello*, 226 U. S. 318.

A rather close search has failed to disclose a single instance where the Federal Courts, through the exercise of judicial discretion, have closed their doors to a State and required it to assert or defend its powers of sovereignty, involving purely a judicial question, before a federal administrative agency. This fact is probably due to the idea which has prevailed throughout the history of this nation that States, as independent sovereigns, should be accorded a dignity not usually and ordinarily accorded ordinary litigants.

The framers of the Constitution and the authors of the Judiciary Act of 1789 (frequently treated as contemporary with the Constitution) clearly recognized that the States, as independent sovereigns, should not be treated as ordinary litigants whether asserting or defending claims to rights and powers and especially was this true in instances involving their power as sovereigns.

The Judiciary Act (1 Stat. at L. 80) provided that "the Supreme Court should have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and the citizens of other States or aliens, in which latter cases it shall have original, but not exclusive jurisdiction".

The earliest recognition by this Court that a State because of its sovereignty should be accorded the dignity not ascribed to ordinary litigants is found in the language of Mr. Justice Blair in the early case of *Chisholm* v. *Georgia*, 2 Dall. 419, 451, 1 L. Ed. 440-454 (1792). The Justice, in discussing the arrangement of the language of the Judiciary Act, said: " • • • probably the State was first named in respect to the dignity of a State".

In speaking for the Court and of the jurisdiction of the court to hear and determine cases wherein States were parties, Mr. Justice Harlan, in *U. S.* v. *Texas*, 143 U. S. 621, 643, said, "Such exclusive jurisdiction was given to this Court *because it best comports with the dignity of a State* that a case in which it was a party should be determined by the highest rather than by a subordinate judicial tribunal of the nation" (Emphasis supplied).

Thus it is seen that throughout the history of this nation, the States have been accorded the dignity incident to sovereignty. Their claims of power and authority of sovereignty were especially dealt with by the framers of our judicial system and they were accorded privileges with respect to their litigation generally, which were not accorded ordinary citizens or business enterprises. They were given the right to assert or defend their sovereign powers before *judicial tribunals*, and it was not contemplated that they would have to place themselves on the level with citizens and business enterprises and assert or defend a sovereign right before a mere administrative agency. *A fortiori*, it was not contemplated that they should submit such claims to the consideration of an agency which by its acts and conduct denies the existence in the States of the very powers and rights claimed.

If the courts should decline jurisdiction of this cause and thereby commit the settlement of the conflict to the Federal Commission, the State and one of its agencies, would be deprived of a hearing before an unbiased and impartial tribunal. The Federal Commission has determined how it will settle the conflict. It has no respect for the State's claim. It is not impartial, and cannot be, or it would not have issued its order requiring the Respondent to show cause why it should not be required to make entries in its corporate accounting records nullifying those made therein at the instance of the State Commission. As observed by the court below, "It would be unrealistic to entertain any doubt as to whether the Federal Commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the orders already made by the State Commission" (R.60).

Throughout the history of this nation the courts have recognized and zealously enforced the provisions of the Federal Constitution and the Federal Judiciary Act providing for the trial of causes and the adjudication of rights before impartial tribunals.

In complete disregard of the principle requiring impartiality, the Federal Commission insists that the courts here, where the sovereign rights of a State are involved, depart from their long-established rule, and commit the solution of a serious judicial question involving the rights and powers of a State to a federal administrative agency. While such action may not violate any Constitutional rights of the State, it would violate the *esprit* of the Federal system as originally conceived, and would unnecessarily humble and humiliate the State, which, it is respect-

fully insisted the Court is not warranted in doing, if there is any way to avoid such result. There is a way. Require the District Court to determine and settle the conflicting claims.

Is it possible that the States of this Nation have sunk so low in the governmental scheme that they are no longer entitled, in the first instance, to contest their sovereign rights before the courts, even though the determination sought is strictly judicial? Are their rights, powers and prerogatives, as independent sovereigns, now so lightly regarded that the Federal Courts may not consider or define them until *after* a biased administrative agency has first considered and first construed and first applied the statutes of the State and determined their relation to a particular Federal Statute?

We insist that any such result is an affront to sovereignty. Such result will, if put into effect, strip the States of the dignity accorded them by the builders of this Nation who set up our great judiciary system which the decisions of this Court have both shaped and recognized.

While we realize that the bureaus and administrative agences of this Nation now exercise many powers and prerogatives formerly possessed and exercised by the States, and seek to deprive the States of the dignity, power and authority accorded them by the founding fathers, we believe this is the first instance in the judicial history of this Nation where a Federal administrative agency, in its grasp for power and authority, has ever asserted or insisted that the States are no longer entitled to assert and defend their sovereign power in the courts of this Nation, without first submitting the question to a mere administrative tribunal.

In conclusion, and with due deference, we insist that the States of this Nation should not, through the application of a mere rule of expediency—a court-made rule—be stripped of their right to resort to the courts in the defense of their sovereign powers, and that they should not further be humiliated by being required to submit to and defend before a mere administrative agency, wholly devoid of genuine judicial power, any of their rights of sovereignty, or be required to plead before such an agency for the privilege of exercising those rights.

Dated:
December 27, 1946

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No. 543

FEDERAL POWER COMMISSION, *et al.*,
Petitioners,

v.

ARKANSAS POWER & LIGHT COMPANY,
Respondent.

PETITION FOR REHEARING

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ARKANSAS POWER & LIGHT COMPANY,
Respondent.

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent above named respectfully petitions for a rehearing and for further oral argument and an opportunity to file further briefs in this case upon the grounds that it appears from the *per curiam* opinion of this Court entered on March 10, 1947, that counsel for the Respondent failed to make it clear that the question sought to be resolved is not determinable by an administrative agency, thus misleading the Court into an extension of the exhaustion concept to cover a situation in which it has never before been applied and to which it obviously should not be applied, the result having been erroneously to deny to the Respondent company an opportunity to obtain a declaratory judgment resolving the dilemma with which it is faced. Indeed, the application of the exhaustion principle in the circumstances

of this case does violence to fair play. The grounds upon which rehearing is sought are hereinafter set forth.

Introductory Statement

This is neither a bookkeeping nor an accounting proceeding. The sole issue is whether, in the unprecedented circumstances of this case, the District Court should have taken jurisdiction to enter a declaratory judgment answering this question, "Does the Federal Power Commission or the Arkansas Public Service Commission have exclusive regulatory control over the basic and fundamental books of account of the Respondent Company?" Each Commission claims that exclusive regulatory authority and neither Commission can deny that it has both asserted and intends to exercise that authority. Both cannot exercise the authority which each claims and the Company must have present direction in the keeping of its fundamental books of account from either one authority or the other.

The Company has repeatedly asserted its willingness to keep two differing sets of books (one of which, however, would of necessity be composed of accounts which are auxiliary and supplementary in nature) in obedience to the commands of the two Commissions, but this will satisfy neither Commission, since *each* demands that the Company's *basic and fundamental books of account* be kept in the manner prescribed by *it*.

The State Commission's position is stated in its order of June 24, 1944, in which it found that it had had jurisdiction "to prescribe the manner in which the Respondent keeps its corporate books, accounts and records, and that the books, records and accounts so prescribed * * * shall be the official corporate accounts and records of the Company". The State Commission added that its jurisdiction

over the Company and its electric and other operations was "complete and comprehensive and [that this Commission] is the only regulatory authority having such all-inclusive jurisdiction" (Pet. Br., p. 54). The State Commission's position is also shown by its resistance to the Federal Commission's claims during the course of the instant litigation.

That the Federal Commission is not satisfied with supplementary or auxiliary records is demonstrated by the fact that it has thus far ignored the Company's offer (which offer still stands) to maintain appropriate supplemental records (rather than its basic and fundamental corporate accounts) in accordance with the requirements of that Commission. It will also be remembered that when, upon oral argument, counsel for the Federal Commission was asked whether Section 301(a) of the Federal Power Act "would enable [the Federal Commission] to supersede the state order as to particular entries", counsel for the Federal Power Commission declined to answer the question squarely and refused to take any position with respect to the issue which the question raised. The Federal Commission's position with respect to this issue is, as a matter of fact, definitively set forth in its Opinion No. 138, *In the Matter of Northern States Power Company*, 64 PUR (NS) 257 (1946). In that case, the question arose whether the Federal Power Commission's requirements controlled "the fundamental or basic corporate books of account of a public utility or licensee". In passing upon this question, the Federal Commission stated again, quoting an earlier and consistently maintained opinion, that there could be no doubt about its authority to require companies subject to its jurisdiction "to keep general corporate and other fundamental accounts and records" covering their "entire utility business" in accordance with *its* system of accounts; that while public utilities and licensees might keep "such other supplementary and memorandum accounts" as might be necessary or appropriate, this could be done only to the extent that "the

integrity of our [the Federal Commission's] uniform system * * * is not impaired." The Northern States company was accordingly required to reflect the entries prescribed by the Commission's order "on its fundamental corporate books of account", and the Commission stated that it would consider any failure to do so a violation of its order.

In view of the foregoing, it is idle to suppose that the Federal Commission will ever be satisfied with supplemental or auxiliary records. Rather, it is too clear for argument that the Federal Commission will insist that *its* requirements control the entries to be made in the Company's basic and fundamental books of account. Further, in view of the theories first announced *In the Matters of St. Croix Falls Minnesota Improvement Company* and *St. Croix Falls Wisconsin Improvement Company*, 43 PUR (NS) 1, 11 (1942), followed *In the Matter of the California Oregon Power Company*, 47 PUR (NS) 194, 195 (1943), and adhered to *In the Matter of The Montana Power Company*, 57 PUR (NS) 193, 226 (1945), it is equally idle to suppose that the Federal Commission will not require the Company to make entries in its fundamental and basic accounting records clearly and directly at variance with the requirements of the State Commission now being followed by the Company. The State Commission, relying on the proviso clause of Section 301(a) of the Federal Power Act, is equally insistent that the Federal Commission has no power to prescribe the entries to be made in the Company's basic and fundamental corporate books of accounts and that the State requirements are controlling.

In view of the foregoing, the conflicting claims of the two Commissions can only be settled by a definitive interpretation of Section 301(a) of the Federal Power Act. The Company sought to obtain such an interpretation by filing a complaint in the District Court of the United States for the District of Columbia seeking a declaratory judgment: (a)

that the Federal Commission does not have the exclusive power asserted by it over the Company's basic and fundamental corporate books of account; (b) that the exclusive power to regulate such accounts is vested in the State Commission; or (c) that, in the event it should be determined that the Federal Commission has the power claimed by it, the State Commission does not have the power which it has claimed and exercised over such accounts. The Federal Commission moved to dismiss the complaint, and the District Court's action in granting such motion, while reversed by the United States Court of Appeals for the District of Columbia in a carefully reasoned opinion which presents what we believe to be the correct view of this case with great cogency and persuasiveness, ultimately was upheld by this Court in a *per curiam* opinion entered March 10, 1947.

We have not yet reached the merits of the case. The question which was presented to this Court for decision was not which of the two Commissions has the power they both claim but whether, in a suit for a declaratory judgment, the District Court should have taken jurisdiction to construe the statute and thus pass upon the Commissions' conflicting contentions. The District Court's refusal to do so was upheld by this Court on the ground that the Company "has failed to exhaust its administrative remedies", citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 and *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540.

It is respectfully submitted that the *Myers* and *Macauley* cases are not applicable here, that to apply the exhaustion principle under the facts and circumstances of this case represents an unwarranted extension of that principle, and that this Court accordingly should have sustained the opinion of the Court of Appeals.

The Exhaustion Principle Should Not Be Applied Under The Facts and Circumstances of this Case.

The Federal Commission is without power to pass upon the issues raised by the Company's complaint.

Questions arising in the routine administration of the Federal Power Act, for example, whether a public utility may change its rates for the transmission and sale of electric energy in interstate commerce, must of course be passed upon in the first instance by the Federal Power Commission. And its determination of such questions may be reviewed only in the manner provided by Section 313(b) of the Act, that is, by appeal to an appropriate Circuit Court of Appeals or to the Court of Appeals for the District of Columbia. Further, where the Federal Power Commission must make an initial determination as to its jurisdiction in order to decide whether it may exercise its *admitted powers* over a given subject matter (for example, whether the waters upon which a project is to be constructed are "navigable waters of the United States") the same principle clearly should be applied. This latter situation is essentially that presented by the *Myers* and *Macauley* cases. But the question here involved is not merely one arising in the routine administration of the Federal Power Act, nor is it merely a question of "coverage". It has to do with whether, in view of the action of the State Commission, the Federal Power Act may be construed to give the Federal Commission *exclusive* power over the subject matter in question, which power, if it exists, *will cause the Federal Commission to supersede the State Commission and oust it from jurisdiction over the same subject matter.* The Company earnestly submits that the decision of this question is beyond either the express or the implied power of the Federal Power Commission, an administrative agency, and hence is not the type of question which must be decided by

the Federal Commission in the first instance, subject only to review by an appropriate court under Section 313(b) of the Federal Power Act. In short, as the opinion of the court below clearly discloses, the question involved is beyond the administrative-procedure-plus-review framework of the Act itself, as well as beyond the scope of the doctrine of prior resort and the doctrine of exhaustion of administrative remedies. As was said by the court below in its discussion of the *Macauley* case:

> "In *Macauley* v. *Waterman Steamship Corporation*, decided by the Supreme Court March 25, 1946, it was held that the Tax Court, an administrative body charged by the Renegotiation Act with determining certain factual questions thereunder, may construe the Act by deciding whether it applies to a given situation. The appellees suggest, therefore, that they have the same right with respect to the Federal Power Act. This argument overlooks the fundamental fact that something more is at stake than merely to gauge the sweep of the federal statute. For it is one thing for a federal administrative agency to rule as to the coverage of its own act when that act stands alone. It is quite another for the agency to decide whether its organic act overrides the statute of a different sovereignty which already has been applied by the state authorities to the situation which the agency desires to control by applying the federal act. That is a task for the courts. We do not understand the Macauley case as extending to a federal agency the unprecedented power of exercising such a clearly judicial function."

The decision of this Court in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 29, 1946, does not militate against this conclusion. In that case, the Federal Power Commission had dismissed an application for a license to construct a project on navigable waters of the United States on the ground that the applicant had not submitted evidence under Section 9(a) of the Act of compliance with the requirements

of a state statute. Since this Court felt that the Federal Power Act gave to the Federal Power Commission the power to issue a federal license completely aside from and without regard to the operation of conflicting state statutes, it was held that the application for a federal license should not have been dismissed for failure to comply with such state statutes. But it was *this Court,* not the *Commission,* which held that the licensing provisions of the Federal Power Act superseded conflicting state statues dealing with the same subject matter. Hence the *First Iowa* opinion is not a holding that the Federal Power Commission has power to decide that other and different sections of the Act supersede state statutes, with the result that state agencies are ousted from jurisdiction over matters which they assert were left to them by the Congress.

For the reasons stated, the decision of this Court in this case goes beyond the principles announced in the *Myers* and *Macauley* cases and extends the exhaustion concept to a situation to which it has never before been applied and to which, in view of the considerations set forth above, it obviously should not be applied. It is, therefore, respectfully prayed that further consideration be given to this question upon rehearing.

Even if it be said that the Federal Commission has power to decide the questions raised by the Company's complaint, it does not follow that it has the exclusive right to decide such questions, or that the District Court, in a suit for a declaratory judgment, should not have taken jurisdiction to decide the questions presented.

Unlike the statutes involved in the *Myers* and *Macauley* cases, the Federal Power Act does not give to the Federal Power Commission the exclusive right to decide in the first instance all questions arising during the course of the administration of such Federal Power Act. Hence, the District Court was not required by statute to direct the Com-

pany to resort to the Federal Commission for a determination of the questions raised by its complaint prior to seeking relief in the courts. And, since the issues raised by the Company's complaint are not issues involving questions of fact or discretion in technical matters, requiring for their solution knowledge commonly found only in a body of experts, but are purely legal questions not within the peculiar competence of an administrative agency, there is no reason here, independent of statute, why the futile step of presenting the question to the administrative agency should be insisted upon. Further, this case does not present the more or less orthodox situation presented by the *Myers* and *Macauley* cases in which the desirability of maintaining orderly procedure outweighs other considerations and it is proper to allocate earlier stages of a given proceeding to the administrative agency concerned and later stages of that proceeding to a court. Here the issue involved is a proper allocation of power not between *court and commission* but between *commission and commission*, with the Company left in an impossible position by reason of the conflicting claims of the two administrative agencies. Hence, in this case, asserted considerations of orderly administrative procedure should give way and the District Court should have taken jurisdiction so that the serious dilemma in which the Company finds itself may be resolved.

As we have already stated, the Federal Commission has prejudged the question about to be referred to it (if this Court's *per curiam* opinion is not reconsidered) as clearly and definitively as such a question could be prejudged. Perhaps the Federal Commission is correct and we are not assailing that Commission when we say that it has prejudged the question at issue. We are merely asserting as vigorously as possible that it *could be wrong*. Certainly the State Commission thinks that the Federal Commission is wrong and that *it* is right. And, in the circumstances,

neither Commission should be permitted initially, at least in the absence of any statutory requirement, to pass upon its own powers. Commission is arrayed against Commission in this case, each with its announced prejudgments and preconceptions, and to permit either one Commission or the other to determine whether it has the power which the other Commission asserts patently does violence to elemental concepts of fair play.

Because of the peculiar facts and circumstances of this case, a holding by this Court that the issues raised by the Company's complaint may be decided at this time by the District Court, without awaiting further action on the part of the Federal Commission, would not have broad significance as a precedent. So to hold would not mean that federal administrative agencies would be subjected to unreasonable delays in the routine administration of their respective acts, nor would it even mean that every challenge to the jurisdiction of such agencies could be taken to a court for determination. It would simply establish that where conflicting claims to jurisdiction are asserted by federal and state agencies under circumstances similar to those existing in this case, and where, if the federal agency's claim is sustained, the federal commission's powers would supersede and override the asserted state powers, the conflicting claims may be settled by a court in the first instance, without the necessity for permitting the federal agency initially to determine that it has the power which the state claims. Thus, to uphold the Company's contentions will not impair the integrity of the administrative process or interfere with effective regulation by federal administrative agencies. Nor will a decision sustaining the Company's position run counter to the considerations of policy upon which the exhaustion doctrine rests.

Conclusion

It is submitted that the decision of the Court in this case goes beyond the *Myers* and *Macauley* cases and applies the exhaustion concept to a situation to which it has never before been applied and to which it obviously should not be applied, and that all considerations bearing upon the desirability of so extending that concept should be clearly appreciated and carefully weighed before such concept is broadened to cover a situation such as that presented here. Accordingly, for the foregoing reasons and for other reasons appearing in the Company's brief, it is respectfully urged that a rehearing be granted in this matter.

Respectfully submitted

P. A. Lasley

A. J. G. Priest

Counsel for Respondent.

Certificate of Counsel

I, A. J. G. Priest, of Two Rector Street, New York, New York, an attorney regularly admitted to practice before this Court and an attorney and of counsel for the above-named respondent, do hereby certify that in my opinion the foregoing petition for rehearing is submitted in good faith and not for purposes of delay.

A. J. G. Priest

New York, New York
April 2, 1947.

No. 543. FEDERAL POWER COMMISSION ET AL. *v.* ARKANSAS POWER & LIGHT CO. Certiorari, 329 U. S. 703, to the United States Court of Appeals for the District of Columbia. Argued March 5, 1947. Decided March 10, 1947. *Per Curiam:* Judgment reversed on the ground that respondent has failed to exhaust its administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303

U. S. 41; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. *Howard E. Wahrenbrock* argued the cause for petitioners. With him on the brief were *Acting Solicitor General Washington, Robert L. Stern, Lambert McAllister* and *Louis W. McKernan*. *A. J. G. Priest* argued the cause for respondent. With him on the brief were *P. A. Lasley, Sidman I. Barber* and *B. H. Dewey, Jr.* By special leave of Court, *Wyatt Cleveland Holland*, Assistant Attorney General, argued the cause for the State of Arkansas. With him on the brief were *Guy E. Williams*, Attorney General, *H. Cecil Kilpatrick*, and the Attorneys General of the States of Alabama, Connecticut, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming, as *amici curiae*. Reported below: 81 U. S. App. D. C. 178, 156 F. 2d 821.